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Supreme Court, U.S.
FILED

No. 001877 MAY 14 2001

In the
Supreme Court of the United States

ANTONIO S. CONTRERAS,
Petitioner,

v.

SUNCAST CORPORATION, an Illinois Corporation, et al.,
Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is Petitioner substantially limited in the major life activity of sexual intercourse, and does that limitation qualify as a disability under the Americans with Disabilities Act (ADA)?
2. Did the Seventh Circuit violate the Equal Protection component of the Fifth Amendment in holding that an employee who may have violated one or more of his employer's "work rules" did not have Article III standing to sue for violations of the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964 because he was not meeting his employer's legitimate expectations?
3. Did the courts below violate the Equal Proection Component of the Fifth Amendment in holding that Petitioner was not meeting his employer's legitimate expectations because he may have violated several of his employer's work rules, where the ADA and ADA case law have provided that an employee meets the definition of "otherwise qualified person with a disability" if he is able to perform the essential functions of the job with or without a reasonable accommodation?
4. Does a plaintiff under the ADA have to be "disabled" within the meaning of the ADA to challenge on a disparate impact basis an employment policy that facially violates the ADA?
5. Do the anti-retaliation provisions of the ADA protect all persons or only "otherwise qualified persons with a disability" and, if they do, did the court below violate Equal Protection by denying standing to the Plaintiff based on his alleged violations of work rules?
6. Did the district court err in relinquishing supplemental jurisdiction over the Petitioner's state law claims when

discovery had been completed, complete diversity existed between the parties at the time of dismissal, and the judge who dismissed the claims was not the judge who would be trying the case?

7. Did the trial judge err in transferring the case to another judge in the Northern District of Illinois when the clerk of the court failed to notify the parties of the reassignment of the case by the chief judge for that district?

8. Was the Petitioner denied his right to an appeal when the order transferring the case from the original judge was never served upon the parties as required by Fed.R.Civ.P. 77(d), and he mistakenly based his appeal on the assumption that the judge to whom the case had been transferred has asserted jurisdiction over the case without a proper assignment order?

9. Did the judge to whom the case was transferred have jurisdiction to allow the Respondents' Bill of Costs?

10. Did the district court violate Petitioner's Due Process Rights when it allowed the Respondents to substitute a later-notarized affidavit for affidavits that had been notarized by one of the Respondents, where the local rules concerning undisputed statements of fact required that those statements specifically reference the pleading they related to, and the Respondent failed to supplement their statements to reference the later-notarized affidavits?

PARTIES TO THE PROCEEDING

Petitioner

Antonio S. Contreras, an individual with no corporate affiliations. Petitioner was employed by the Respondents.

Respondents

Suncast Corporation, a corporation organized under the laws of and doing business in the State of Illinois; four individually named officers or employees of Suncast: Thomas Tisbo, President of Suncast Corporation; John Baunach, Human Resources Manager of Suncast Corporation; J. Randall Guillotte, a production supervisor at Suncast Corporation; and Michael Hamilton, Vice President of Finance and Administration of Suncast Corporation.

The preceding individuals and entities were parties to the proceeding in the court below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2
- I. Factual Background 2
- II. Procedure in the Courts Below 4
  - A. Northern District of Illinois 4
  - B. Seventh Circuit 5
- III. Plaintiff's Federal Discrimination Claims 6

REASONS FOR GRANTING THE PETITION 13
- I. Review is Warranted Because The Courts Below Committed Constitutional Errors in Denying Contreras' Claims 13

A. The Circuits Have Split Over Whether an Employee Must Be "An Otherwise Qualified Person with a Disability" to Challenge Conduct that Violates the ADA 13
B. Review Is Warranted Because the Seventh Circuit's Cases Have Improperly and Unevenly Applied Standing in Civil Rights Cases in a Way That Undermines This Court's Rulings and Congressional Intent; The Courts Below Resolved this Case on Constitutional Grounds Where None Needed to Exist 17
C. Review is Warranted Because Allowing Standing to Turn on Whether an Employee is "Meeting the Legitimate Expectations of His Employer" Violates the Equal Protection Component of the Fifth Amendment 19
D. Suncast's ADA Accommodations Policy Is Facially Invalid. 23
II. Review is Warranted Because the Number of Procedural Errors Below Deprived Contreras of Due Process 25
A. Omission of Chief Judge Aspen's March 3 Transfer Order from the Court Record Denied Contreras His Right to an Appeal 25
B. Review is Warranted Because the Court Below Violated Due Process in Allowing Suncast's Affidavits into Evidence 27

C. The Court Below Erred in Relinquishing Supplemental Jurisdiction over the State Law Claims 28

CONCLUSION 29

APPENDIX

Appendix A
Seventh Circuit Decision, 1/3/01 . . . . . 1a
Seventh Circuit Judgment, 1/3/01 . . . . . 24a

Appendix B
District Court Bill of Costs Order, 5/22/00 . . . . . 26a

Appendix C
District Court Memorandum Opinion and Order, 3/15/00 . . . . . 32a
District Court Judgment, 3/15/00 . . . . . 52a

Appendix D
District Court Reassignment Order, 3/7/00 . . . . . 56a

Appendix E
Transfer of Case By Clerk of Court to the Executive Committee For Reassignment, 3/1/00 . . . . . 58a
Order of the Executive Committee, 3/3/00 . . . . . 60a

Appendix F
Seventh Circuit Order Denying Rehearing, 2/13/01 . . . . . 61a

Appendix G
Constitutional Provisions and Statutes Involved 63a

Appendix H
Table Showing Disparity in Imposition of Discipline for Violations of Suncast's Work Rules 72a

TABLE OF AUTHORITIES

Cases **Page(s)**

Alexander v. Sandoval,
2001 U.S. LEXIS 3367; 69 U.S.L.W. 4250
(Dkt. 99-1908, April 24, 2001) 24

Baker v. Carr,
369 U.S. 186, 204 (1962) 21

Bates v. United States,
522 U.S. 23 (1997) 14

Bragdon v. Abbott,
524 U.S. 624 (1998) 11, 12

Brazinski v. Amoco Petroleum Additives Co.,
6 F.3d 1176 (7th Cir. 1993) 28

Buckley v. Valeo,
424 U.S. 1 (1976) 22

Burlington Indus. v. Ellerth,
524 U.S. 742 (1998) 20

Bush v. Gore,
531 U.S. 98 (2000) 22

Crawford v. Indiana Department of Corrections,
115 F.3d 481 (7th Cir. 1997) 18

Faragher v. Boca Raton,
524 U.S. 775 (1998) 20

Griffin v. Steeltek,
160 F.3d 591 (10th Cir. 1998) 13

Kyles v. J.K. Guardian Security Services, Inc.,
222 F.3d 289 (2000) 18

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 6, 25

Noble v. White,
996 F.2d 797 (5th Cir. 1993) 28

Olmstead v. L.C.,
527 U.S. 581 (1999) 14, 16

Oncale v. Sundowner Offshore Servs.,
523 U.S. 75 (1998) 20

Raines v. Byrd,
521 U.S. 811 (1997) 15, 16

Reeves v. Sanderson Plumbing Products,
530 U.S. 133 (2000) 24

Roe v. Cheyenne Mount. Conf. Resort,
124 F.3d 1221 (10th Cir. 1997) 15

Russello v. United States,
464 U.S. 16 (1983) 14

Schneiker v. Fortis Insurance Company,
200 F.3d 1055 (7th Cir. 2000) 14, 15

Shanaghan v. Cahill,
58 F.3d 106 (4th Cir. 1995) 28

St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993) 25

Sutton v. United Air Lines,
527 U.S. 471 (1999) 11

Warth v. Seldin,
422 U.S. 490 (1975) 21

Wright v. Assoc. Ins. Cos. Inc.,
29 F.3d 1244 (7th Cir. 1994) 29

Constitutional Provisions, Statutes, and Other Authorities

U.S. Const., Amend. V . . . . . i, 2, 19, 22

U.S. Const., Amend. XIV 2, 19, 22

U.S. Const., Amend. XIV (¶ 5) 19

U.S. Const., Article III, ¶ 2 2

Americans with Disabilities Act (ADA) . . . . . *passim*
42 U.S.C. § 12102(2) 12
42 U.S.C. § 12111(4) 14
42 U.S.C. § 12111(8) 14, 20
42 U.S.C. § 12112 2
42 U.S.C. § 12112(a) 14
42 U.S.C. § 12112(b)(5) 6
42 U.S.C. § 12112(d)(4) 13
42 U.S.C. § 12112(d)(4)(A) 15
42 U.S.C. § 12115 15
42 U.S.C. § 12203 . . . . . 2, 6, 17

Civil Rights Act of 1964 (Title VII) . . . . . i, 3
42 U.S.C. § 2000e-2 . . . . . 2, 6
42 U.S.C. § 2000e-3 2
42 U.S.C. § 2000e-3(a) 6

Fed.R.Civ.P. 77(d) . . . . . ii, 2

Fed.R.Civ.P. 56 27

Local Rule 2.30(G) 26, 29

Local Rule (12) 27

Local Rule 40.1(f) 26

Local Rule 40.4 26

Local Rule 56 27

28 U.S.C. § 1331 4

28 U.S.C. § 1367 2

28 U.S.C. § 1367(a) 4

29 C.F.R. § 1630(j)(1) 11

PETITION FOR A WRIT OF CERTIORARI

Petitioner Antonio S. Contreras, formerly an employee of Suncast Corporation, respectfully prays that a writ of certiorari be issued to review the judgment of the Seventh Circuit Court of Appeals in this case. In plain contravention of the requirements of the Constitution of the United States and federal law, the Seventh Circuit has embarked on an *ad hoc*, standardless, and lawless exercise of judicial power, which appears to thwart the considered judgments of the United States Congress. Because the issue of constitutional standing is governed directly by the Article III of the Constitution, the court's decision involves issues of the utmost federal importance.

OPINIONS BELOW

The decision of the Seventh Circuit Court of Appeals, (App., *infra*, 1a-23a) is reported at 237 F.3d 756 (7th Cir. 2001). The order denying the petition for rehearing is reported at 2001 U.S. App. LEXIS 2332 (February 13, 2001) (App., *infra*, 57a). The memorandum decision of the District Court (App., *infra*, 32a-51a) is not published.

JURISDICTION

The judgment of the Seventh Circuit was entered on January 3, 2001. A petition for rehearing with suggestion for rehearing *en banc* was filed on January 17, 2001. This petition for rehearing was denied on February 13, 2001.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Article III, ¶ 2. (App. G at 63a.)

U.S. Const., Amend. V. (App. G at 63a-64a.)

U.S. Const., Amend. XIV. (App. G at 64a.)

Fed.R.Civ.P. 77(d). (App. G at 64a-65a.)

Americans with Disabilities Act,
42 U.S.C. § 12203. (App.G at 65a.)

Americans with Disabilities Act,
42 U.S.C. § 12112. (App. G at 65a-68a.)

Civil Rights Act of 1964 (Title VII),
§§ 2000e-2, 2000e-3. (App. G at 68a-69a.)

28 U.S.C. § 1367. (App. G at 69a-71a.)

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Contreras is a 33-year old naturalized Mexican-American. Suncast hired Contreras as a forklift operator in 1994. Contreras was hurt in 1995, and requested light-duty accommodations that were allowed to other employees. He filed for worker's compensation in 1995, and for unemployment compensation in 1995 during a factory-wide

layoff.[1] When plaintiff's work restrictions became permanent during the period from November 1995 through January 1996, he promptly experienced a series of minor disciplinary write-ups, ultimately leading to his termination. Other employees, including illegal aliens, had similar or worse attendance histories, but Suncast did not routinely terminate those employees. [See Table, App. H, *infra* at 70a].

Plaintiff was fired within a month after filing his first EEOC charge in January 1996, which he made the same week he was suspended from work, allegedly for tardiness.

Contreras' back injuries were aggravated due to Suncast's refusal to honor his medical restrictions during 1995. The subsequent injuries prevented him from fully recovering, and have disqualified him from his primary profession, which was as an operator of a machine that punches heavy metal parts out of metal blanks. Contreras also experienced a decrease of about 90% in his ability to engage in sexual intercourse after his injuries. Since then, the frequency has decreased from about 20 times a month to two times a month which, Contreras testified, was due to his physical condition after late 1995, the time period in question here.

He sued in 1996, alleging violations of the Americans with Disabilities Act and Title VII of the Civil Rights of 1964,

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[1]Suncast challenged Contreras' unemployment claim after it terminated him, alleging for cause termination on grounds of tardiness. Suncast's challenge to that claim was denied.

and state law claims alleging wrongful discharge in violation of public policy, negligent supervision, and assault.[2]

II. PROCEDURE IN THE COURTS BELOW

Jurisdiction in the district court was invoked pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367(a).

A. NORTHERN DISTRICT OF ILLINOIS

On March 3, 2000 the Hon. Ann Claire Williams reassigned the case to Judge Conlon pursuant to Local Rule 2.30(G) [App. D, *infra* at 56a].

On March 3, 2000, the Executive Committee of the District Court also transferred the case to Judge Conlon. However Chief Judge Marvin Aspen's order was never entered in the docket and the parties were never told of it. Chief Judge Aspen's order does not appear in the short record that was transmitted to the Seventh Circuit, and the order was not served upon the parties [App. E, *infra* at 60a].

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[2]Contreras moved from Illinois to Texas while this case was pending. He refiled his state law claims in the U.S. District Court for the Northern District of Illinois in May 2000. After the Seventh Circuit issued its ruling in January 2001, the judge presiding over Contreras II asserted collateral estoppel against Contreras' wrongful discharge claims and granted the defendants' Motion for Summary Judgment on the remaining claims. Contreras II is reported at 129 F. Supp. 2d 1173, 1178-79 (N.D.Ill. February 12, 2001). If the Court grants this application, modification of the judgment in Contreras I could allow Contreras to apply to vacate the judgment in Contreras II. If the court modifies the judgment in Contreras I, it could also result in inconsistent verdicts.

On May 22, 2000 Hon. Suzanne B. Conlon allowed Suncast's Bill of Costs, to the extent of $4,945.20 [App., *infra* at 26a-31a].

On March 15, 2000, Judge Williams granted Suncast's summary judgment motion and denied Contreras' cross-motion for summary judgment. A motion to compel financial records not produced during discovery was denied as moot with entry of the final judgment. Contreras moved to strike affidavits of defendants that had been notarized by defendant John Baunach, who was Suncast's Human Resources Director. That motion was denied as moot. The summary judgment ruling and judgment are printed *infra* at App., 32a-53a.

The district court held that plaintiff did not have Article III standing to challenge the employer's ADA accommodations policy, which plaintiff contends is facially invalid. The issue on this Count was whether any employee could challenge such a policy, or whether Congress intended only that persons who satisfy all prongs of the ADA can bring such suits.

There were no findings of fact or conclusions of law.

Contreras appealed the March 15, 2000 judgment. The judgment was docketed on March 16, 2000. He timely filed his Notice of Appeal on April 13, 2000.

B. SEVENTH CIRCUIT

After briefing, oral argument was had on November 30, 2000. The Seventh Circuit issued its opinion on January 3, 2001. Contreras filed a petition for rehearing with suggestion for rehearing en banc on January 17, 2001. The

court denied the rehearing petition on February 13, 2001, and judgment was entered against Contreras on February 13, 2001. This appeal was timely docketed with the Court in Washington, D.C. on May 14, 2001.

The Seventh Circuit, in a decision by Chief Judge Flaum, slightly modified the decision of Judge Williams. The essential holding did not change: both courts below concluded that Contreras did not have Article III standing to assert ADA or Title VII claims for the reason that he had violated several of Suncast's "work rules."[3]

III. PLAINTIFF'S FEDERAL DISCRIMINATION CLAIMS

The case below ultimately proceeded on Contreras' First Amended Complaint. Count V was dismissed, and the following seven claims proceeded to summary judgment:

1. Title VII, 42 U.S.C. § 2000e-2
2. Title VII, 42 U.S.C. 2000e-3(a) (retaliation)
3. ADA, 42 U.S.C. § 12112(b)(5)
4. ADA, 42 U.S.C. § 12203 (retaliation)
6. Assault
7. Negligent Supervision

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[3]The judge in Contreras II later clarified that he asserted collateral estoppel in February 2001 based on Judge Williams' ruling in March 2000, not the decision that subsequently was issued by the Seventh Circuit in January 2001. In any event, Contreras II violates federalism principles in that Illinois' wrongful discharge law has adopted the McDonnell Douglas burden-shifting approach. The district court erred in Contreras II because it substituted the Seventh Circuit's "late for work" analysis for the state law to which it was obligated to defer, sitting in diversity.

8. Wrongful Discharge in Violation of Public Policy.

The district court relinquished jurisdiction over counts 6, 7, and 8. That decision remains on appeal in the Seventh Circuit. Plaintiff has sought to stay those proceedings pending the Court's decision on this petition.

Count 1 asserted that Contreras was denied light-duty reassignment at Suncast's factory after his initial injury in the summer of 1995 and that white employees received such reassignments. Count 2 asserted that Contreras was retaliated against in February 1996 for having filed a charge with the EEOC on January 18, 1996.

The ADA counts alleged three different types of violations. Count 3 first asserted that Suncast failed to accommodate Contreras once his limitations became permanent between October 1995 and January 1996. Count 3 also asserted that Suncast's accommodations policy was facially invalid and had a disparate impact on disabled employees.[4] Contreras argued that the policy was facially invalid because employees with "short-term work-related

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[4]Suncast defined its accommodations policy in answers to interrogatories:

> Baunach made no independent determination at the time as to whether a request was "reasonable" or "not reasonable," instead he simply tried to ensure that the Company's policy of returning employees with short-term work-related injuries to type of work [sic] consistent with their medical limitations was fulfilled. All of the requested "accommodations" described [for the named employees] were of limited duration.

injuries" are by definition not "disabled" and therefore excluded from the ADA. Contreras' third assertion under Count 3 was that Suncast retaliated against Contreras for having requested workplace accommodations between July 1995 and February 1996, and for having filed the first charge with the EEOC during January 1996.

All of the federal claims were decided on the same basis - that Contreras did not have Article III standing because he was not meeting Suncast's legitimate expectations due to alleged violations of certain "work rules."[5]

In support of his contention that Suncast's white employees received light-duty assignments on more favorable terms than Suncast's Hispanic employees,[6] Contreras offered proof that several white employees who received light duty work during the same time period were no better educated than Contreras, and that Suncast treated Contreras' medical absences as "unexcused," while it counted as "excused"

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[5]The evidence disputed whether the alleged violations ever occurred. The most notable was the "Chingado Incident," in which Guillotte wrote up Contreras for calling him "chingado" (i.e., motherfucker, jerk, or idiot), when Contreras testified, and no evidence other than Guillotte's testimony disputed, that Contreras was saying in his native Mexican idiom, "Vamanos a la chingada" (i.e., "let's get the hell out of here"). Based on his rudimentary knowledge of Spanish (gained from his Hispanic wife, who apparently taught him the word), Guillotte thought Contreras was calling him "chingado."

[6]Suncast's factory payroll was reported to be approximately 75% or more Hispanic. Suncast employed more than 750 people year-round at all relevant times.

absences of other injured employees, even though those other injuries did not occur at work.

In support of his contention that Suncast treated Contreras less favorably than other employees due to his physical limitations, Contreras offered evidence that other Hispanic employees missed more time or as much time and were promoted or not discharged, that Respondent Guillotte (the supervisor who had been writing up Contreras for alleged disciplinary infractions) missed more time than Contreras,[7] whose tardiness in 1996 was due largely to separate family crises, such as an automobile accident involving his common law wife, a child who had gotten a hand caught in a car door, and one incident in which Contreras failed to call in to advise of his tardiness at least an hour before the start of his afternoon shift.[8]

A table showing the difference in disciplinary treatment given to Contreras and his coworkers is attached as Appendix H, 70a-72a. The table shows that the work rules were not evenly enforced and that attendance issues like those asserted by Suncast did not always result in discharge. Marco Aguilar, with whom Contreras commuted, was actually

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[7]Guillotte's own supervisor called Guillotte's absences "historic." After the summary judgment decision in March 2000, Suncast apparently discharged Guillotte for attendance problems. Guillotte admitted during his depositions that at times he had missed more work than Contreras.

[8]That time, Contreras was driving to work with a co-worker, Marco Aguilar, whose car broke down less than an hour before the shift start time - Contreras could not have complied with the one-hour requirement because the facts giving rise to his tardiness did not exist an hour before the start of his shift.

promoted before he left Suncast. Contreras asserted the fact that other employees had similar attendance issues but were not automatically discharged in support of his argument that his discharge was a pretext for discrimination resulting from his medical problems.

Contreras argued that he was disabled within the meaning of the ADA for two reasons: first, he is no longer able to perform heavy factory labor. His treating physician, Dr. Robert Eilers, testified at deposition that Contreras would only be able to perform sedentary or lighter-duty work, and that heavy lifting for more than four hours a day would be unsafe for him. The lifting restrictions described by Suncast, the district court, and the Seventh Circuit were not part of Contreras' argument that he was substantially limited in the major life activity of working. Contreras argued on this point first, that he could no longer perform heavy factory labor which, for a machinist, which he was by trade, is in effect a career-ending injury. Contreras also argued that disqualification from one's primary occupation is in itself a substantial limitation on the major life activity of work.

Contreras also argued that he was protected by the ADA because he was substantially limited in the major life activity of sexual intercourse. Suncast tendered no evidence to suggest that Contreras was not limited in this activity. Judge Williams found Contreras to be substantially limited in this activity, but still held that he did not have Article III standing due to violations of Suncast's work rules. Judge Flaum reversed the district court on appeal: "Contreras has not shown any significant impact on his ability to reproduce. He has not produced even a scintilla of evidence that he is significantly restricted as to the condition, manner or duration under which he can reproduce as compared to the average

person in the general population. See 29 C.F.R. sec. 1630, (j)(1)."

The issue the Court must address is whether sexual intercourse is a "major life activity" within the meaning of the ADA. In Bragdon v. Abbott, 524 U.S. 624 (1998), this Court observed that "Reproduction and the sexual dynamics surrounding it are central to the life process itself." The Bragdon Court also noted that "Nothing in the definition [of disability in the ADA] suggests that activities without such a dimension may somehow be regarded as so unimportant or insignificant as not to be "major." While Bragdon involved a woman whose ability to bear children was affected by the likelihood of her transmitting HIV virus to a fetus, nothing in Bragdon indicates that the Court did not intend to include sexual intercourse in the rubric of "major life activities" covered by the Act. Similarly, nothing in the ADA suggests that Congress meant to exclude that activity from the law, because the act defines disability to include a physical or mental impairment that substantially limits "one or more major life activities." Presumably Congress meant to include all activities in this legislation, and absent evidence of legislative intent to the contrary.

Contreras contends on appeal that the Seventh Circuit erred because it failed to make an individualized inquiry into whether Contreras' limitations posed a substantial limitation to Contreras, as the ADA requires. What might be a substantial limit to some persons may be no limit at all to others. The decision below is at odds with the ADA regulations and case law, all of which suggest that an individualized inquiry into the impact of the impairment on the life of the individual is required. Sutton v. United Air Lines, 527 U.S. 471 (1999). "The definition of disability also requires that disabilities be evaluated "with respect to an

individual" and be determined based on whether an impairment substantially limits the "major life activities of such individual." [42 U.S.C. § 12102(2)]. Thus, whether a person has a disability under the ADA is an individualized inquiry. Id. at 483, citing Bragdon.

This leaves three points for argument in this petition: first, whether Contreras was meeting Suncast's legitimate expectations at the time of his discharge in February 1996 and, second, whether Contreras has standing to challenge the facial invalidity of Suncast's ADA accommodations policy, regardless of whether he has a substantially limiting major life activity. The answer to both questions is "yes."

The third reason to grant this petition is that the decisions that came from the Seventh Circuit stripped Contreras of his wrongful discharge claim. By finding that Contreras was not meeting Suncast's legitimate expectations, Contreras cannot prevail on his wrongful discharge claim. This raises equal protection, federalism, and due process concerns.

If Contreras I in fact had been transferred to Judge Conlon in March 2000, Judge Williams, who had been elevated to the Seventh Circuit, should not have authored the decision. As a result, several procedural errors resulted. First, the judgment was void. Second, the void judgment has since been asserted against Contreras in a subsequent diversity action even though the Seventh Circuit modified Judge Williams' judgment after Contreras II was decided. Third, the decision to relinquish the state law claims in Contreras I should have been made by the judge who was going to actually try the case, presumably Judge Conlon. All of these factors suggest that even if Contreras was not meeting Suncast's expectations, the proceedings below have deprived

him of his day in court first on the federal claims, then on his state law claims.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE COURTS BELOW COMMITTED CONSTITUTIONAL ERRORS IN DENYING CONTRERAS' CLAIMS

A. THE CIRCUITS HAVE SPLIT OVER WHETHER AN EMPLOYEE MUST BE "AN OTHERWISE QUALIFIED PERSON WITH A DISABILITY" TO CHALLENGE CONDUCT THAT VIOLATES THE ADA

Most important among the errors in the courts below is the split among the circuits. Even within the Seventh Circuit courts have split over when the requirement of standing is met.

In Griffin v. Steeltek, 160 F.3d 591, 594 (10th Cir. 1998), the Tenth Circuit considered the same issue. There, the issue was preemployment drug testing. The ADA section at issue there provided as follows:

> (4) Examination and inquiry.
> (A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an *employee* as to whether such *employee* is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4). (emphasis added.)

The fact that 42 U.S.C. § 12111(4) defines "employee" to mean employee, but that section 12111(8) specifically includes prospective employees means that Congress intended that those sections be interpreted differently. See Olmstead v. L.C., 527 U.S. 581 (1999) (citing Bates v. United States, 522 U.S. 23, 29-30 (1997) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,'" quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

The applicable sections in the case at bar are different. The Seventh Circuit has not generally allowed all employees to challenge any practice that violates the ADA. However, the Seventh Circuit has failed to articulate a clear and discernible test for when an employee may challenge practices that violate the ADA. In Schneiker v. Fortis Insurance Company, 200 F.3d 1055 (7th Cir. 2000), the plaintiff alleged that Fortis' job posting system has a disparate impact on its disabled employees. The Court wrote:

> The ADA protects only those employees who are "qualified individuals with a disability," 42 U.S.C. sec. 12112(a); therefore, Ms. Schneiker would also have to be "disabled" in order to bring a disparate impact claim under the ADA.

Id. at 1062. The ADA section in Schneiker[9] is different from the ones Contreras claims under.

In the Tenth Circuit, for example, a nondisabled employee could not challenge a drug testing policy that required her to disclose prescription drug use to her employer for the reason that she had not been impacted by the policy. Roe v. Cheyenne Mount. Conf. Resort, 124 F.3d 1221 (10th Cir. 1997). The statutory section there provided:

> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A).

Unlike Contreras, the plaintiff in Cheyenne Mountain could not claim that she had been impacted by the policy. Contreras' retaliation claims permit him to show that he was in fact impacted by the illegal policy. However, in Cheyenne Mountain, the reason the Tenth Circuit gave was that "the standing inquiry focuses on whether the plaintiff is the proper party to bring this suit," which requires that the plaintiff show that she has a personal stake in the litigation. Cheyenne Mountain, 124 F.3d at 1228, citing Raines v. Byrd, 521 U.S. 811 (1997). Contreras meets the Tenth Circuit standard.

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[9]Although the decision does not specify, it appears that Schneiker challenged the posting of notices of rights pursuant to the ADA, 42 U.S.C. § 12115.

Cheyenne Mountain is noteworthy because the anti-retaliation provisions of the ADA use completely different language:

> Prohibition against retaliation and coercion.
> (a) Retaliation. *No person* shall discriminate against *any individual* because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.
> (b) Interference, coercion, or intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with *any individual* in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged *any other individual* in the exercise or enjoyment of, any right granted or protected by this Act.

42 U.S.C. § 12203 (emphasis added). This section clearly states, "any other individual" - in other words, any person may apply for protection against retaliation, assuming the person has invoked the ADA, or encouraged someone to invoke it, or participated in some manner in an investigatory proceeding. Subsection b clearly states that "any individual" may exercise rights protected or granted by the ADA, and further states that a person may encourage "any other individual" in the exercise of similar rights. Congress did not intend to restrict the antiretaliation provisions to "otherwise qualified persons with disabilities" because it omitted that language from this section. See Olmstead, *supra* at p. 10. Even if Contreras does not meet the definition of "person with

a disability" in the ADA, he still can qualify for protection under 42 U.S.C. § 12203, even if he was late for work.

The Supreme Court should resolve the issue of whether an employee who is not disabled can assert an ADA retaliation claim, particularly since so many litigants who are asserting ADA claims are being found by the lower courts to be not disabled in the first instance. The only thing harsher than denying those claims in the first place is to sanction firing employees who made the mistake of believing that Congress meant to root out this type of discrimination when it passed the ADA.

B. REVIEW IS WARRANTED BECAUSE THE SEVENTH CIRCUIT'S CASES HAVE IMPROPERLY AND UNEVENLY APPLIED STANDING IN CIVIL RIGHTS CASES IN A WAY THAT UNDERMINES THIS COURT'S RULINGS AND CONGRESSIONAL INTENT; THE COURTS BELOW RESOLVED THIS CASE ON CONSTITUTIONAL GROUNDS WHERE NONE NEEDED TO EXIST

In a recent Title VII case, Judge Rovner wrote for the Seventh Circuit that, that:

> Where federal statutory rights are at issue, however, Congress has considerable authority to shape the assessment of standing. First, although it may not lower the threshold for standing below the minimum requirements imposed by the Constitution. . . .Congress can extend standing to the outermost limits of Article III. For example, it may permit an

> individual who suffers an injury-in-fact to bring suit for a statutory violation even if one normally would not think of that person as an intended beneficiary of the statute; or it can permit someone to seek relief based on the legal rights of individuals other than himself. . . . When Congress confers such a broad right to sue, the judiciary may not close the doors to the courthouse by invoking prudential considerations. . . . Second, Congress has the power to "enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." . . . . (citations omitted).

Kyles v. J.K. Guardian Security Services, Inc., 222 F.3d 289 (2000) (job tester given standing to challenge discriminatory practices).

Whether a person has Article III standing to sue under the ADA, consequently, "depends in great measure on the particular rights conferred by th[e] statute[]." Id. It is untenable to allow standing to job testers (who do not even want the jobs they are applying for) to challenge discriminatory practices, but not real live disabled persons. Certainly Congress did not intend for Kyles to have standing to challenge Suncast's policy as a job applicant, but not Contreras, who actually worked there and was injured there. It reduces the ADA to a cruel hoax to suggest that all disabled persons should seek employment as job testers.

Equally odd is a Title II ADA case that came out of the Seventh Circuit in 1997. In Crawford v. Indiana Department of Corrections, 115 F.3d 481, 484-86 (7th Cir. 1997), then-Chief Judge Posner supported the right of a blind

prisoner to sue to obtain "full and equal access" to certain prison facilities or programs. Presumably if Mr. Crawford had been late to the exercise yard too often (or cursed at a guard or another inmate), the Seventh Circuit could have denied him standing to sue.

In sum, these cases coming from the Seventh Circuit not only do not establish that compliance with "work rules" or similar regulations are elements of standing. They further establish that the holding below conflicts with other case law and other statutes. In particular, Contreras, who is a naturalized American citizen, cannot be denied standing under both Title VII and the ADA.

Even if the ADA is an invalid exercise of Congress' Fourteenth Amendment (¶ 5) or commerce clause powers, no court has yet held that an individual like Contreras cannot sue for Title VII violations due to "work rule" violations. Even if Contreras loses his ADA challenges, his separate Title VII claims (discrimination in job assignments and retaliatory discharge) should nevertheless be allowed to go forward.

It cannot have been Congress' intention in adopting the ADA to give greater access to the federal courts to Willie Horton than to immigrant factory workers, even those with spotty attendance records.

C. REVIEW IS WARRANTED BECAUSE ALLOWING STANDING TO TURN ON WHETHER AN EMPLOYEE IS "MEETING THE LEGITIMATE EXPECTATIONS OF HIS EMPLOYER" VIOLATES THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT

The Tenth Circuit's approach, which has traditionally been applied in standing cases, constitutional law, free speech, and environmental law, and administrative law cases, is the right one to control this issue. The Seventh Circuit erred in keying standing to whether an employee was meeting his employer's legitimate expectations at the time of discharge. Those concerns might defeat a claim at summary judgment or at trial, but they are completely different from the issue of whether the plaintiff presents a cognizable claim for some relief.

Congress defined a "qualified person with a disability" in 42 U.S.C. § 12111(8). The definition is specific, and nowhere provides for modification by employers. An employee is protected if he is able to perform the essential functions of his position, with or without a reasonable accommodation.

This court addressed similar issues in the 1996-98 terms in a series of Title VII cases. See, e.g., Faragher v. Boca Raton, 524 U.S. 775 (1998) (vicarious liability applied to employer) and Burlington Indus. v. Ellerth, 524 U.S. 742 (1998) (employee could sue even though she had not suffered any tangible loss of job benefits); and Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) (Title VII applies to same-sex harassment). In each case Title VII was interpreted to apply to the case at issue - but in none of those cases did the elements of proof determine whether constitutional standing existed.

The essence of standing is the standard set forth in Warth v. Seldin, 422 U.S. 490 (1975).[10] The issue is whether the plaintiff has suffered (or pleaded or alleged proof sufficient to prevail at trial) a harm that can be redressed by a federal court - in other words, whether the facts constitute a case or controversy and whether the plaintiff is a proper person to challenge the harm he alleges. Standing is a prudential concern that gives courts pause before they intervene in disputes - not an insuperable barrier used to stave off litigants who have entered the courthouse perimeter. The Tenth Circuit's considered standard (whether the employee has been impacted by the employer's policy) is a better one than the Seventh Circuit's arbitrary and unworkable standard (whether the plaintiff has been late for work).

Standing must be the same for the same wrong in every judicial district. The Seventh Circuit's standard violates equal protection - two employees at different companies who have missed the same amount of work might or might not have standing, depending on whether they are in violation of

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[10]The standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. Baker v. Carr, 369 U.S. 186, 204 (1962). The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . . ." Warth, at 422 U.S. at 498-99. Contreras was fired within a few weeks of filing his first EEOC charge, and suspended the same day he requested permanent accommodations. These facts alone should meet the requirements of Article III.

some work rule that has absolutely nothing to do with either Article III or the egregiousness of the defendant's conduct. When the federal government treats similarly situated persons differently, litigants like Contreras must resort to equal protection under the Fifth Amendment for protection from arbitrary and capricious behavior. Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.") Since standing is essential to obtaining due process, the Seventh Circuit's standing standard, which excludes a class of litigants that Congress intended to protect, is unconstitutional.

In Bush v. Gore, 531 U.S. 98 (2000), this Court recently addressed this exact situation - where ballots that were identically marked were or were not counted as votes, depending on what county in Florida the votes happened to have been cast in. For the same reasons that applied there, the Seventh Circuit's "late for work" analysis fails equal protection analysis - it injects factors not contemplated by Congress into the definition of "qualified person with a disability."

Even if Contreras had no standing to bring the federal claims in Contreras I, the Seventh Circuit's decision itself confers standing on him to appeal that decision. Since March 2000, another judge has asserted collateral estoppel against Contreras based on Judge Williams' ruling, which was modified by the Seventh Circuit. Even if the Court suggests that no harmful error existed before the appellate process began, the Seventh Circuit's ruling itself created a cognizable wrong that can be remedied in this appeal. Sending Petitioner back to the Seventh Circuit in Contreras II not only invites the inevitable affirmance, but it puts Petitioner back here in 12

months applying for a second writ, after he has already had to wait 5 years (and two months) for his day in court.

D. SUNCAST'S ADA ACCOMMODATIONS POLICY IS FACIALLY INVALID

Unlike race, gender, or national origin, whether an employee is disabled is a fluid issue. Most employees will be male or female, black or white, for their entire lives. However, any employee can become disabled at any time, particularly factory workers and manual laborers. Since employees become disabled during (and because of) their employment every day, employees have a right to know that, once they are permanently injured, that their employers will accommodate them and their injuries.

In the case at bar, Contreras challenged Suncast's accommodations policy, which is set out in footnote 4, *supra* at 7. The policy does not apply to persons with permanent injuries - only those with short-term work-related injuries. Apart from the fact that injuries that are not "work-related" can cause disabilities, "short-term" injuries are never disabilities, because they are temporary impairments by definition. In other words, permanently injured employees may not be accommodated at all by Suncast. There is no reason to apply a higher standard of compliance with work rules to Contreras than to Suncast.

Even if Contreras proves that he is an otherwise qualified person with a disability (and all of the other subparts that that proof requires, such as a substantial limitation of a major life activity, meeting the legitimate expectations of the employer, and being able to perform the essential functions of his job with or without an accommodation), Suncast's policy does not protect him, because it only applies to employees

with short-term work-related injuries. It makes no sense to require Contreras incur a short-term injury to come within the protection of the policy.

The Seventh Circuit's reasoning departs significantly from existing Supreme Court precedent. In ADA cases, like other civil rights cases, the Supreme Court has consistently held that the requirements for prevailing on civil rights retaliation claims are less stringent than those for prevailing on substantive disparate impact or disparate treatment claims. In other words, as long as an employee invokes an anti-discrimination law in good faith, the employee is protected, at minimum, under the respective anti-retaliation provisions of those laws.

Even if Contreras is not substantially limited in the major life activity of intercourse, and even if Contreras violated several work rules, that does not mean that Suncast did not fire him because he had requested accommodations or filed an EEOC charge or filed a worker's compensation claim.

In Alexander v. Sandoval, 2001 U.S. LEXIS 3367; 69 U.S.L.W. 4250 (Dkt. 99-1908, April 24, 2001), this Court recently held that the spending clause regulations under Title VI were not enforceable by private parties in disparate impact claims. However, there is no such restriction yet on the commerce clause provisions of the ADA. The Seventh Circuit disregarded 20 years of established Supreme Court precedent, upheld as recently as in Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000).[11]

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[11]Like the plaintiff in Sanderson, Contreras was accused of falsifying time records. Suncast never introduced any time records

This line of cases, from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) through St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), when applied to the ADA, requires a plaintiff to prove only that he was able to perform his job, with or without reasonable accommodations, and that he suffered an adverse employment action because of his disability. The courts below inverted these requirements - instead of placing the reasons for Contreras' dismissal at issue in the "pretext" phase of the burden-shifting analysis, they moved them to the prima facie case (actually, even, before that) - where they have nothing to do with the plaintiff's allegations.

Contreras did rebut all of the reasons for his dismissal, and showed that other nondisabled or white employees received more favorable treatment. He should have been allowed to bring his case to trial. If nothing else, he was entitled to declaratory relief - that Suncast's accommodations policy is facially invalid.

II. Review is Warranted Because the Number of Procedural Errors Below Deprived Contreras of Due Process

A. Omission of Chief Judge Aspen's March 3 Transfer Order from the Court Record Denied Contreras his Right to an Appeal.

As Chief Judge Flaum observed, much of the appellate briefs and oral argument were spent arguing lack of

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as evidence, and all evidence in the record of this incident consists of self-serving statements or hearsay - the timecards themselves were not in the record.

jurisdiction on the part of Judge Conlon. The omission of Chief Judge Aspen's transfer order from the short record prevented Contreras from obtaining a full and fair hearing on appeal. Had the fact that Judge Aspen transferred the case pursuant to the rules been known, Contreras would not have dedicated so much effort to challenging Judge Conlon's jurisdiction over the case. In addition, Contreras' defense to the Bill of Costs was based almost entirely on Judge Conlon's lack of jurisdiction.

Contreras had every right to believe that the only transfer order that had been entered was the order of Judge Williams, which transferred the case to Judge Conlon pursuant to a local rule that did not exist in March 2000. In any event, Chief Judge Aspen also transferred this case pursuant to Local Rule 2.30(G). "Local Rule 2.30(G)" did not exist on March 3, 2000 - it had been replaced by Local Rule 40.4, and neither transfer order cited the proper transfer rule for cases assigned to departing judges, which was 40.1(f). Judge Williams erred in transferring the case on March 3, 2000 after it had been reassigned on March 1, 2000 by the Clerk to the Executive Committee.

Judge Williams was not sitting on the district court on March 15, 2000 and could not continue to hear cases that were no longer assigned to her. Contreras had no reason to believe that the case had ever been properly reassigned to Judge Conlon because the only order the parties ever received indicated that Judge Williams had transferred the case on her own initiative - after the Clerk had in fact removed it from her docket and after she was no longer sitting on the district court. Since the other orders were never served upon the parties, Contreras was denied his right to an appeal.

B. Review is Warranted Because the Court Below Violated Due Process in Allowing Suncast's Affidavits into Evidence

The Northern District of Illinois had in place a Local Rule (12), whose subparagraphs M and N controlled the filing of "statements of disputed facts" and ""statements of undisputed facts." These rules were intended to simplify summary judgment practice by requiring the parties to allege with references to the factual record the facts that supported or refuted their parties' arguments. Failure to rebut a fact with a responsive fact from the record results in the court's deeming of those facts as true for purposes of summary judgment. The rule is strictly construed.

These local rules changed in 1999, and the rules were renumbered. The new Local Rule 56 matches Fed.R.Civ.P. 56, which, regulates summary judgment practice. When it filed for summary judgment, Suncast filed several affidavits that had been notarized by John Baunach, one of the defendants, and a Respondent to this Petition. Petitioner filed a motion to strike those affidavits after summary judgment briefing was completed. The district court denied that motion, having previously allowed Suncast to file affidavits that had been later-notarized and later-filed with the court. These later-filed affidavits were never incorporated in the local rule 12M and 12N filings. In other words, the first set of affidavits should not have constituted evidence, because they were not properly executed.[12] Moreover, the second set

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[12]This is an issue of Illinois law, and the federal courts are bound by Illinois' law on the issue of whether an affidavit has been properly executed so as to meet the requirements of the Federal Rules of Civil Procedure.

of affidavits did not constitute evidence because they were not referenced in any 12M or 12N filings. By allowing the averments in those affidavits into evidence, the district court violated Contreras' due process rights.

C. The Court Below Erred in Relinquishing Supplemental Jurisdiction over the State Law Claims

Although it is rarely litigated, a district court's supplemental jurisdiction is not unlimited. It extends only to state law claims that form part of the same "case or controversy." Although the district court ultimately held that Petitioner did not have standing to challenge under federal law the acts and omissions that he complains about, this is not the same thing as saying that all state law claims should be relinquished when the federal claims have been dismissed. Where, as here, extensive discovery was had and the parties had completed the discovery, little is to be gained by sending the parties back to state court. Here, Contreras had relocated from Texas to Illinois by March 2000, and diversity jurisdiction existed. In addition, the Seventh Circuit has identified a list of factors.

The standard of review of a district court's decision to exercise supplemental jurisdiction is abuse of discretion. Shanaghan v. Cahill, 58 F.3d 106, 110 (4th Cir. 1995); Noble v. White, 996 F.2d 797, 799 (5th Cir. 1993) Once all federal questions are resolved before trial, the district court must relinquish jurisdiction over all state law claims. Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1181-82 (7th Cir. 1993). Once all federal claims are resolved "a district court should consider and weigh the factors of judicial economy, convenience, fairness and comity in deciding whether to exercise jurisdiction over state-law claims."

Wright v. Assoc. Ins. Cos. Inc., 29 F.3d 1244, 1251 (7th Cir. 1994). Here, the judge who dismissed the claims was not the judge who was able to weigh these concerns - judicial economy is best left to the judge who is going to allocate the resources at issue, which was no longer Judge Williams in March 2000.

The district court's procedure with regard to the transfer of this case was inconsistent with its own local rules. The rule cited by Judge Williams (2.30(G)) did not exist in March 2000, and the order signed by Chief Judge Aspen was never served upon the parties. The transfer order was therefore arbitrary and capricious, and a departure outside of the usual practices and customs of federal courts as to warrant reversal by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted in order to reverse the following judgments and orders below:

1. the judgment of the Seventh Circuit in Contreras I;
2. the bill of costs allowed by the District Court based on lack of jurisdiction and vacate all orders entered since then by Suncast, who has attempted to enforce this Judgement;
3. the judgment of the District Court, which has been asserted against Contreras in Contreras II;
4. enter summary judgment against Suncast on Petitioner's Cross-Motion for Summary Judgment on the issue of whether Suncast's accommodations policy violates the ADA;
5. remand these proceedings to the Seventh Circuit with instructions for further proceedings;

6. enter a temporary order staying enforcement of the judgment below in order to prevent the Seventh Circuit from asserting collateral estoppel against Contreras in Contreras II; and
7. for such other and further relief as this honorable court deems just and proper.

Respectfully submitted,

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May 14, 2001

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Filed January 3, 2001]

Nos. 00-1977, 00-2493

Antonio S. Contreras, *Plaintiff-Appellant*,	)
v.	)
Suncast Corporation, an Illinois Corporation, Thomas Tisbo, John Baunach, Randall Guillotte, and Michael Hamilton, *Defendants-Appellees*.	)

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
No. 96 C 3439--Ann Claire Williams and Suzanne B. Conlon, Judges.

Argued November 30, 2000--Decided January 3, 2001

Before Flaum, Chief Judge, and Easterbrook and Rovner, Circuit Judges.

Flaum, *Chief Judge*.

Antonio Contreras was injured in a forklift accident while employed by Suncast. After repeated violations of Suncast's safety protocols, work attendance policies, and acts of insubordination, Contreras was dismissed by the company. Contreras thereafter filed suit alleging a multitude of claims, primarily revolving around the assertion that Suncast had discriminated against him in violation of both Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act ("ADA"). The district court granted Suncast summary judgment on all of Contreras's claims, denied Contreras's cross-motion for partial summary judgment and dismissed Contreras's remaining state law claims. The court also awarded Suncast a partial bill of costs. Contreras now appeals both the summary judgment determinations as well as the award of costs. For the reasons stated herein, we affirm.

I. BACKGROUND

Antonio Contreras, born in Monterrey, Mexico, is a naturalized citizen of the United States. Beginning in November of 1994, Contreras was employed as a forklift operator for Suncast Corporation ("Suncast"), a manufacturer and distributor of lawn and garden equipment. During Contreras's employment stint, Thomas Tisbo was Suncast's President, Michael Hamilton was the Vice President, John Baunach was the Manager of Human Resources, and Randall Guillotte was a Production Flow Supervisor responsible for supervising forklift drivers.

Contreras's physical problems began on June 21, 1995, when he was injured on the job in a forklift accident.

Contreras filed a workers compensation claim, and as a result of his injuries, was instructed by his physician not to drive a forklift for more than four hours a day and to spend the remainder of the day on light work duty. Suncast complied with these restrictions though Contreras argues that Suncast's accommodations were inadequate. On December 18, 1995, Contreras was again injured when he stood up quickly and struck his head on a metal rack after hearing Guillotte call out his name. Contreras's work limitations became permanent on January 12, 1996.

Contreras's disciplinary problems began on July 20, 1995, when he was given a verbal, followed by a written warning for violating forklift safety procedures. On November 7, 1995, Guillotte observed Contreras and two co-workers violating forklift safety rules. Guillotte met with the three as a group and gave each of them a copy of the safety rules to review. As Guillotte walked away from the meeting he heard Contreras say "chingado," from which he understood Contreras to be calling him a "motherfucker." Contreras maintains that what he actually uttered was "vamanos a la chingada," an idiom for "let's get the hell out of here." Regardless, Guillotte gave Contreras a verbal warning for his insubordination. Contreras also repeatedly violated Suncast's attendance policies. Between January 3, 1996, and February 8, 1996, Contreras violated attendance policies seven different times and was caught falsifying a Suncast time card in an attempt to cover up one of these violations. When Contreras was caught falsifying the time card, he was suspended. At that point, he filed an EEOC charge claiming that Suncast was discriminating against him on the basis of national origin. On February 12, 1996, Contreras violated the company attendance policy for an eighth time in a little over one month.

Having been progressively disciplined for these multiple offenses, Suncast discharged Contreras on February 13, 1996. The following day, at the behest of Contreras's union representative, Suncast offered to reinstate Contreras. Contreras informed the company that he was not interested in returning to work, but that he wished to pursue legal action instead.

Contreras brought suit in the district court raising a litany of claims against Suncast. Specifically, Contreras alleged (1) that he was wrongfully terminated and not given a light work duty in violation of Title VII of the Civil Rights Act of 1964; (2) that Suncast retaliated against him by discharging him, after he filed an EEOC charge, in violation of Title VII; (3) that he was not reasonably accommodated after his injury and discriminated against for requesting accommodations, in violation of the ADA; (4) that Guillotte assaulted him by intentionally causing him to bang his head on the metal rack; (5) that Suncast was negligent in supervising Guillotte and directing Guillotte to stalk and assault Contreras; (6) that Suncast wrongfully discharged him after he filed a workers compensation claim. On March 15, 2000, the district court granted summary judgment to Suncast on all federal claims, and dismissed the state law claims without prejudice. Those state law claims have been refiled in the district court under 28 U.S.C. § 1332. On May 22, 2000, after this case had been reassigned, the district court partially granted Suncast's Bill of Costs. Contreras appealed the grant of summary judgment along with the judgment granting the Bill of Costs. These two appeals have been consolidated and we now address them.

II. DISCUSSION

A. Contreras's Title VII Claims

Contreras contends that the district court erred in granting summary judgment to Suncast on his national origin discrimination claims under Title VII. We review a district court's grant of summary judgment de novo, viewing the facts and drawing all reasonable inferences in the light most favorable to the nonmoving party. *See Stockett v. Muncie Indiana Transit Sys.*, 221 F.3d 997, 1000 (7th Cir. 2000). Summary judgment is appropriate only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see James v. Sheahan*, 137 F.3d 1003, 1006 (7th Cir. 1998).

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000(e)-2(a)(1). A plaintiff may meet his burden of proof under Title VII by offering either direct proof of discriminatory intent or by proving disparate treatment through the indirect, burden-shifting method outlined by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Stockett*, 221 F.3d at 1000-01; *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997). In this case, Contreras offers no direct proof of discrimination but attempts to meet his burden through showing discriminatory treatment under the *McDonnell Douglas* test.

Under the *McDonnell Douglas* burden shifting method, the plaintiff must raise an inference of discrimination by offering sufficient evidence to make out the prima facie case. *Pafford v. Herman*, 148 F.3d 658, 665 (7th Cir. 1998). To establish a prima facie case under *McDonnell Douglas*, the plaintiff must demonstrate that (1) he belongs to a protected class; (2) he performed his job satisfactorily; (3) he suffered an adverse employment action; and (4) his employer treated similarly situated employees outside of his protected class more favorably. *See Stockett*, 221 F.3d at 1000-01; *Plair*, 105 F.3d at 347. If a plaintiff is able to make the prima facie showing, there is a presumption that the plaintiff was discriminated against, and the employer must come forward with a legitimate non-discriminatory reason for the employment action. *See McDonnell Douglas*, 411 U.S. at 802. At this stage, the employer need not prove that it was actually motivated by the proffered reason. Rather, an employer "need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981). Once the defendant has met this burden of production, the plaintiff must prove by a preponderance of the evidence that the reason offered by the defendant is merely a pretext for discrimination. *Id.* at 253. While the *McDonnell Douglas* approach is often called a "burden shifting" method of proof, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*

The majority of Contreras's argument on his Title VII claims is devoted to showing that similarly situated

individuals outside the protected class were treated more favorably than Contreras. In fact, Contreras goes so far as to frame the issues for review as if the "similarly situated" prong of *McDonnell Douglas* is the only burden keeping him from establishing the prima facie case, and thus the dispositive issue in determining whether the district court decision should be reversed. We are unpersuaded. Perhaps Contreras's strategy is a recognition that he cannot establish the prima facie case. The district court granted Suncast summary judgment, finding that Contreras could not meet both the second and fourth prongs of the *McDonnell Douglas* prima facie case; namely that Contreras could not prove that he was meeting Suncast's legitimate expectations and that he could not show that similarly situated non-Hispanic employees received more favorable treatment. Contreras's failure in either of these regards is sufficient to uphold the district court's grant of summary judgment. Thus we proceed by analyzing first whether Contreras was meeting the legitimate expectations of Suncast.

Contreras was employed by Suncast as a forklift operator. On November 14, 1994, Contreras acknowledged receiving a copy of Suncast's Work Rules and General Plant Safety Rules. Those Rules establish two groups of violations. Group A violations, which the company believes to be so serious that a first offense may call for immediate discharge, include falsifying information on company records (Rule A-4), insubordination (Rule A-7), and taking extended rest periods (Rule A-9). Group B violations are considered less serious, and call for a tiered response, beginning with a verbal warning, followed by a written reprimand, suspension and finally discharge. Relevant to our inquiry, Group B violations include failing to obey safety rules (Rule B-7), and repeated

unexcused absences (Rule B-11). Though we recognize that coming to work, not falsifying documents, and not being insubordinate, are usually implicit expectations that an employer has for his or her employees, by putting these requirements in Suncast's Work Rules, there can be no claim that these were not legitimate expectations of the company. *See Robin v. Espo Eng'g Corp.*, 200 F.3d 1081, 1090 (7th Cir. 2000), ("At the outset, this Court's inquiry into the issue of legitimate expectations is more aptly characterized as simply bona fide expectations, for it is no business of a court in a discrimination case to decide whether an employer demands 'too much' of his workers. In other words, so long as the employer's employment expectations are in good faith, without fraud or deceit, we only determine if the employee met them.") (internal citations omitted). The uncontradicted evidence is that Contreras did not meet those bona fide expectations. Contreras was repeatedly cited for operating his forklift in an unsafe manner. Furthermore, within less than six weeks, Contreras violated the company's work attendance guidelines on no less than eight occasions. On one such occasion, Contreras doctored company records in an attempt to conceal his infraction. Finally, the "chingado incident," as Contreras refers to it, shows a level of insubordination that in itself was worthy of dismissal[1]. All these facts show that Contreras was not meeting the legitimate expectations of

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[1]Contreras argues on appeal that since summary judgment requires that we draw all reasonable inferences in favor of the nonmoving party, in this instance Contreras, that we must accept as true his version of the chingado/vamos a la chingada episode. However, it is irrelevant for our purposes which version is accurate. Either way, Contreras's words evince an attitude of actual and perceived insubordination that factored into his dismissal.

Suncast, and Contreras has not presented evidence to demonstrate the existence of a genuine issue of material fact on the subject[2]. Had he done so he could have moved on to the next stage of analysis. *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1179 (7th Cir. 1997)[3]. However, as we have

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[2]In his brief, Contreras refers to this checkered employment record as a "series of minor disciplinary write-ups." We view that characterization as extremely generous.

[3]Although the evidence is uncontradicted that Contreras was not doing the job for which he had been hired, if he could show that, even so, it was his national origin that induced the defendant's adverse employment actions, he might have had a case. For it is not a defense to a discrimination case that the plaintiff should have been fired, if he would not have been fired had it not been for discriminatory animus. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995); *Dranchak v. Akzo Nobel Inc.*, 88 F.3d 457, 461 (7th Cir. 1996). But that would be a case in which the plaintiff had direct evidence of discrimination and was not dependent on the *McDonnell Douglas* burden shifting formula. If the plaintiff has no direct evidence of discrimination and is therefore confined to the formula, he must prove that he was meeting (or at least that there is a genuine issue of whether he was meeting) his employer's bona fide expectations, before he can force the employer to produce the reasons for why he was fired or otherwise subjected to adverse action. He cannot get anywhere in such a case merely by trying to prove that he was fired for a reason unrelated to his deficiencies. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993). For such evidence to defeat summary judgment, the plaintiff must have made out a prima facie case under *McDonnell Douglas*. *See Coco*, 128 F.3d at 1179-80. Because Contreras has failed to do this, his present attempt to use comparisons to similarly situated individuals in order to prove

stated, should a plaintiff fail to establish that he was meeting the employer's bona fide expectations, he is not entitled to present his case to the jury and we need not proceed to the remaining steps of the *McDonnell Douglas* framework. *See Espo Eng'g Corp.*, 200 F.3d at 1090; *see also Coco*, 128 F.3d at 1179 ("If the plaintiff has other evidence of discrimination, well and good; but if he has nothing else, and is therefore totally reliant on the *McDonnell Douglas* formula, he is out of luck if he can't show that he was meeting his employer's legitimate expectations."). Given that Contreras cannot make out the prima facie case under the approach, we find no need to examine whether similarly situated individuals not of his protected class were treated differently. Because Contreras had to prove that he was meeting the legitimate expectations of Suncast in order to make the prima facie case for both his Title VII discriminatory discharge and discriminatory job assignment claims, and he has failed to do so, we affirm the district court's rulings in both of these matters.

B. Contreras's ADA Claims

Contreras claims that the district court erred in granting summary judgment to Suncast on his failure to reasonably accommodate claim. Once again, the bulk of Contreras's argument is devoted to a discussion of similarly situated individuals. Specifically, his brief suggests that "[t]he fact that only Contreras of all these people was fired

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discrimination is inappropriate.

allows the inference that his discharge was related to his requests for accommodations."[4]

The ADA prohibits discrimination by covered entities, including private employers, against qualified individuals with a disability. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 477 (1999). Specifically, the ADA provides that no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Section 12112(b) of the Act defines the different ways in which discrimination under section (a) might occur. Relevant to our inquiry, the ADA states that "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee" is considered discrimination, "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A). Thus, in order for a plaintiff to recover under the ADA for an employer's failure to reasonably accommodate, that plaintiff must first show: (1) that he was or is disabled as defined by the Act, (2)

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[4]Even assuming arguendo that Contreras's similarly situated individuals were not fired from Suncast, we are puzzled at how this fact relieves Contreras from the burden of establishing an ADA failure to reasonably accommodate claim. However, we will read Contreras's argument as a broad challenge to the summary judgment decision against him on the ADA claims, and address the actual relevant issues.

that his employer was aware of the disability, and (3) that he was qualified for the position in question. *Best v. Shell Oil Co.*, 107 F.3d 544, 547-48 (7th Cir. 1997). To qualify for the position in question, the plaintiff must show that he is physically capable of performing the essential functions of the position, with or without an accommodation, and that he meets the legitimate educational, training, experience, and other requirements set by the employer for the position. *See Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 676 (7th Cir. 1998).

Under the ADA, a disability is defined as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). Contreras contends that because of his injuries, he was substantially limited in the major life activities of working as well as reproduction/engaging in sexual relations. We examine each of these claims in turn.

As it has been defined, "substantially limits" means that the person is either unable to perform a major life function, or is significantly restricted in the duration, manner, or condition under which the individual can perform a particular major life activity, as compared to the average person in the general population. *See* 29 C.F.R. § 1630.2(j). When we discuss the major life activity of working, "substantially limits" means the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes. *Webb v. Choate Mental Health and Dev. Ctr.*, 230 F.3d 991, 998 (7th Cir. 2000). "Thus an individual is not substantially limited in working just

because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent;" instead, "the impairment must substantially limit employment generally." 29 C.F.R. § 1630.2(j), App. (1999); *see Webb*, 230 F.3d at 998. As such, Contreras has the burden of presenting evidence to demonstrate that his impairment limited his ability to perform an entire class of jobs. *See Skorup v. Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1998).

In support of his claim that he is substantially limited in the major life activity of working, Contreras advances that he is unable to lift in excess of 45 pounds for a long period of time, unable to engage in strenuous work, and unable to drive a forklift for more than four hours a day. Taking Contreras's assertions as fact, we fail to see how such inabilities constitute a significant restriction on one's capacity to work, as the term is understood within the ADA. Contreras has not presented evidence that even hints at the notion that he is precluded from a broad class of jobs. Though this precise claim has not found its way into our published case law, we note that other circuits faced with similar sets of facts have found those limitations do not qualify as a substantial limitation on working (and thus a disability under the ADA). *See e.g. Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (holding as a matter of law that "twenty-five pound lifting limitation-- particularly when compared to an average person's abilities--does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity"); *Aucutt v. Six Flags Over Mid-America*, 85 F.3d 1311, 1319 (8th Cir. 1996) (holding plaintiff failed to show he was substantially limited

in major life activities where "a 25-pound lifting restriction was the only medical limitation placed upon [plaintiff's] activities"); *Ray v. Glidden Co.*, 85 F.3d 227, 228-29 (5th Cir. 1996) (holding that inability to continuously lift containers weighing on average 44-56 pounds "does not render a person substantially limited in the major life activities of lifting or working"); *Wooten v. Farmland Foods*, 58 F.3d 382, 384, 386 (8th Cir. 1995) (plaintiff not substantially limited in major life activity of working where plaintiff was restricted to light duty with no working in cold environment and no lifting items weighing more than 20 pounds)[5]. Nor have we ever

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[5]We note, however, that there is a line of Seventh Circuit case law which could be read to suggest an opposite result. While Contreras has chosen not to rely on these cases, we believe it important to identify these cases and explain why they are inapplicable to these circumstances. In *DePaoli v. Abbott Lab., Inc.*, 140 F.3d 668 (7th Cir. 1998), *Best*, and *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908 (7th Cir. 1996), we found that the plaintiffs had produced enough evidence to survive summary judgment on the issue of whether they were disabled under the ADA because of their substantial limitations in the major life activity of working. But what is significant about these cases is the court's emphasis on the breadth of the restrictions placed on the plaintiffs and their doctors' recommendations concerning how their respective injuries would affect their ability to obtain other employment. *See DePaoli*, 140 F.3d at 673 (evidence showed that plaintiff's injury precluded her from virtually any job requiring repetitive movement of the hand); *Best*, 107 F.3d at 548 (doctor advised that plaintiff should "find another line of work" due to his knee injury); *Cochrum*, 102 F.3d at 911 (nature of plaintiff's shoulder injury and doctor's broad restrictions indicated that plaintiff could be disqualified from a broad range of jobs). In contrast, Contreras's restrictions are quite specific and he has offered no evidence--other than the restrictions

suggested that forklift operation, the specific job Contreras claims he cannot perform for more than four hours, is broad enough to constitute a class of jobs. It was Contreras's burden on summary judgment to show that he could come up with evidence to show he could meet his ultimate burden of showing an ADA recognized disability. *See DePaoli*, 140 F.3d at 672. He has not done so. Thus, the district court was correct to reject Contreras's claim that he is substantially limited in the major life activity of working.

Contreras also suggests that he is disabled in the major life activities of sexual reproduction and engaging in sexual relations. These claims are based completely on Contreras's unsupported assertion that while he was able to have intercourse 20 times a month prior to his accident, at present he can only have sex two times a month. That sexual reproduction is a major life activity was acknowledged by the Supreme Court in *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) ("In the absence of any reason to reach a contrary conclusion, we agree with the Court of Appeals' determination that reproduction is a major life activity for the purposes of the ADA"). Furthermore, we recognize it may be argued that the Supreme Court may have implied that engaging in sexual relations is a major life activity. *See Bragdon*, 524 U.S. at 638 ("[r]eproduction and the sexual dynamics surrounding it are central to the life process itself.")[6]. However, we find Contreras's attempts to liken his

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themselves--to show that his back injury limits his ability to engage in a class of jobs.

[6]The district court, for purposes of the summary judgment motion, assumed that Contreras was disabled within the terms of

situation to that of *Bragdon* unconvincing. In *Bragdon*, the Court considered whether HIV was a physical impairment within the meaning of the ADA. In that case, plaintiff brought an action--under the portion of the ADA that dealt with equal access to public accommodations--against a dentist who had refused to treat her in his office. In reaching the conclusion that an HIV infected woman was substantially limited in her ability to reproduce, the Supreme Court focused on the fact that an infected woman who attempts to reproduce imposed a significant risk of transmitting the disease to any male she has intercourse with as well as to her child during gestation and childbirth. *Bragdon*, 524 U.S. at 639.

It is apparent that our present situation is readily distinguishable from *Bragdon*. The Supreme Court's ruling in that matter does not stand for the proposition that a change in the frequency with which an individual can engage in intercourse, as a result of a bad back, constitutes an impairment which substantially limits a major life activity. Rather, the Court based its decision on the undeniable impact

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the ADA because of his proposed sexual intercourse limitations, and found his claim lacking for other reasons. We note that notwithstanding the Ninth Circuit's decision in *McAlindin v. San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999), this Court has not established a rule that sexual relations are a major life activity for ADA purposes. In this instance, resolution of that issue is not required in order to agree that summary judgment for Suncast was appropriate. Therefore, we will not address the issue of whether sexual relations is a major life activity and instead we will proceed to examine whether Contreras has met his other burdens in establishing a claim of failure to reasonably accommodate under the ADA.

that HIV can have on the feasibility of reproduction. Contreras has not shown any significant impact on his ability to reproduce. He has not produced even a scintilla of evidence that he is significantly restricted as to the condition, manner or duration under which he can reproduce as compared to the average person in the general population. *See* 29 C.F.R. § 1630.2(j)(1). In addition, even if we assume that engaging in sexual relations is a major life activity, Contreras has not substantiated his claim of sexual difficulties with any documentation or testimony beyond a general assertion that the frequency with which he has relations has decreased. Such a bald declaration, without anything more, cannot create a genuine issue of material fact as to Contreras being disabled that would preclude summary judgment. Therefore, we find that it was appropriate to grant Suncast summary judgment on these ADA claims.

C. Contreras's Claims of Retaliatory Firing Under Title VII and the ADA

Contreras argues that his termination by Suncast constitutes an act of retaliation, prohibited by both Title VII and the ADA. Specifically, Contreras puts forth that the only reason he was terminated was because Suncast wished to punish him for requesting accommodations and filing an EEOC complaint. Title VII prohibits employers from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Similarly, the ADA provides that "[n]o person shall discriminate against any individual because such

individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203.

In order to prevail on a claim of retaliation, a plaintiff must either offer direct evidence of retaliation, or proceed under a burden-shifting method. *See Smart v. Ball State Univ.*, 89 F.3d 437, 440 (7th Cir. 1996). Since Contreras has offered no direct evidence of retaliation, he must make the prima facie case for discriminatory retaliation. Under both Title VII and the ADA, the prima facie case requires that Contreras prove (1) that he engaged in statutorily protected activity; (2) that he suffered an adverse employment action; and (3) that there is a causal connection between the two events. *Id.* Once the prima facie case is established, the burden shifts to Suncast to articulate a legitimate and nondiscriminatory reason for its actions which Contreras must show to be a pretext for unlawful retaliation. *Rennie v. Dalton*, 3 F.3d 1100, 1108-09 (7th Cir. 1993).

Contreras claims that he was terminated on February 13, 1996 in retaliation for filing his EEOC charge on January 18, 1996. In that charge, Contreras claimed that defendants harassed him on the basis of his national origin and denied him reasonable accommodations. Yet, Contreras has presented nothing more than temporal proximity in support of his causal connection argument. "Timing may be an important clue to causation, but does not eliminate the need to show causation." *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1179 (7th Cir. 1998) (internal citation omitted). We have held that absent other evidence of retaliation, a temporal

relation is insufficient evidence to survive summary judgment. *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1136 (7th Cir. 1997). The evidence shows that Contreras was terminated after a series of unexcused absences and acts of insubordination. He has done nothing to establish that his filing of an EEOC charge or request for accommodations even factored into Suncast's decision to dismiss him. In fact, the pattern of events suggests that the complaint and request for accommodations were non-factors in his dismissal. Therefore, we agree with the district court that Contreras has failed to make the prima facie case for retaliation for both Title VII and ADA purposes.

D. Contreras's Motion for Summary Judgment

Contreras filed a cross-motion for partial summary judgment in this matter, claiming that Suncast's accommodation policy is a per se violation of the ADA. The district court determined that because Contreras was not a qualified individual with a disability, he did not have Article III standing to challenge Suncast's accommodations policy as facially invalid. Contreras suggests that the district court's opinion is inconsistent, in that it found Contreras to be disabled while at the same time denied him standing under the ADA. First, as we stated above, we do not read the district court's opinion to have determined the disability issue conclusively. The court did not make the requisite analysis that would be necessary in order to find one disabled under the ADA, but rather assumed "for the purposes of [the summary judgment] motion . . . that Contreras is disabled under the ADA." Secondly, as the court below noted, even presuming that Contreras is disabled, that is not the only hurdle he must pass in order to have standing to challenge

Suncast's accommodations policy. The ADA, by its language, protects qualified individuals with disabilities from discrimination in employment. 42 U.S.C. § 12112(a). A "qualified individual" with a disability is one who with or without reasonable accommodation, is able to perform the essential functions of his job. The district court determined that Contreras had failed to establish that he was a qualified individual with a disability under the ADA, in that he did not present evidence that he was both disabled and able to perform the essential functions of his forklift driver job with reasonable accommodations. Thus, the court believed that Contreras could not have established injury in fact as is required for Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

We agree with the district court's interpretation that Contreras does not have standing to challenge Suncast's accommodation policy, in that he is not a qualified person with a disability, the type of individual protected by the relevant portions of the ADA. *See e.g., Stuckey v. City of Naperville*, No. 97 C 7037, 1998 WL 173298 at *4 (N.D. Ill. April 7, 1998) ("Stuckey focuses his attention on a claim that the City's disability policy is a 'per se violation of the ADA' and . . . inexplicably overlooks the fact that he is without standing to contest the City's policy if he is not a qualified individual with a disability under the ADA. In other words, the potential illegality of the City's policy does not automatically allow Stuckey to proceed with his claim under the ADA."). Contreras's impairment did not bring him within the gamut of those who could challenge the legality of Suncast's accommodations policy, and the fact that he is no longer employed by the company means that there is no risk that he will ever suffer an injury as a result of the policy.

Therefore, we affirm the district court's decision finding Contreras lacked standing to challenge Suncast's accommodations policy.

E. Contreras's Remaining Claims

Finally, we note three additional arguments raised by Contreras. Though Contreras devoted the majority of his oral argument to these claims, we find them unconvincing and therefore will dispose of them without much elaboration. Contreras's first of these contentions is that the district court abused its discretion by allowing Suncast to resubmit four affidavits to cure the procedural defect that they had been originally notarized by Baunach, a party to the lawsuit. Contreras has presented no evidence or case law to support the idea that the district court's act of allowing Suncast to replace the invalid affidavits with a disinterested notary's signature constitutes "a decision that no reasonable person could agree with--a ruling that is fundamentally wrong." *Roy v. Austin Co.*, 194 F.3d 840, 843 (7th Cir. 1999). We find no error in the district court's actions, and certainly none requiring reversal in this matter.

Secondly, Contreras finds error in the district court's decision to dismiss his remaining state law claims without prejudice after the court granted Suncast summary judgment on all federal claims. According to the supplemental jurisdiction statute, a district court "may decline to exercise supplemental jurisdiction" over pendent state law claims if the court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). "A decision to relinquish pendent jurisdiction before the federal claims have been tried is, as we have said, the norm, not the exception,

and such a decision will be reversed only in extraordinary circumstances." *Disher v. Info. Resources, Inc.*, 873 F.2d 136, 140 (7th Cir. 1989). Here, given that Contreras has refiled these state law claims in federal court, invoking diversity jurisdiction, we fail to find any extraordinary circumstances that would even approach suggesting that the court, in dismissing the claims, abused its discretion.

Lastly, Contreras suggests this case was improperly transferred to Judge Conlon (who rendered the decision on costs), and that therefore the award of costs should be nullified. After summary judgment was granted, this case was transferred from Judge Williams to Judge Conlon, on account of Judge Williams' elevation to this Court. Pursuant to Local Rule 40.1(f), which Contreras cites but inexplicably ignores, cases on the calendar of a leaving judge shall be reassigned under the direction of the Executive Committee. On March 3, 2000, the Executive Committee ordered as follows: "IT IS HEREBY ORDERED that theClerk [sic] of the Court reassign the above-captioned case by lot to the calendar of an active judge of this court in accordance with the Rules." Given the above-cited local rule and the language of the reassignment order, we do not understand how Contreras could claim that this case was improperly transferred. The issue of costs in this matter was decided by an impartial Article III judge, and to the extent that Contreras's argument implies that the district court circumvented local rules in this regard, we categorically disagree.

III. CONCLUSION

For the foregoing reasons, we Affirm the decision of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

[Filed January 3, 2001]

Nos. 00-1977 & 00-2493

ANTONIO CONTRERAS,	)
Plaintiffs - Appellant	)
	)
v.	)
	)
SUNCAST CORPORATION, THOMAS TISBO, JOHN BAUNACH, et al.	)
Defendants - Appellees	)
	)

BEFORE: Honorable JOEL M. FLAUM, Chief Judge

Honorable FRANK H. EASTBROOK, Circuit Judge

Honorable ILANA DIAMOND ROVNER, Circuit Judge

JUDGMENT - WITH ORAL ARGUMENT

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
No. 96 C 3439, Ann Claire Williams and Suzanne B. Conlon, Judges

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

APPENDIX B

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

[Filed May 22, 2000]

No. 96 C 3439

ANTONIO CONTRERAS,)
)
v.)
)
SUNCAST CORP., et al.)
)

Magistrate Judge: Suzanne B. Conlon

MOTION:

Bill of Costs

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]
(2) ☐ Brief in support of motion due ____.
(3) ☐ Answer brief to motion due ____. Reply to answer due ____.
(4) ☐ Ruling/Hearing on ____ set for ____ at ____.

(5) ☐ Status hearing [held/continued to] [set for/re-set for] on ____ set for ____ at ____.

(6) ☐ Pretrial conference [held/continued to] [set for/re-set for] on ____ set for ____ at ____.

(7) ☐ Trial [set for/re-set for] on ____ at ____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to ____ at ____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]
☐FRCP4(m) ☐General Rule 21
☐FRCP41(a)(1) ☐FRCP41(a)(2)

(10) ■ [Other docket entry] The bill of costs [100-1] is granted in part. Contreras is directed to pay Suncast $4,945.20 in costs. [SEE REVERSE FOR DETAILS.]

/s/ Suzanne B. Conlon

(11) ■ [For further detail see order on the reverse side of the original minute order.]

(Reserved for use by the Court)

ORDER

Antonio Contreras ("Contreras") sued Suncast Corp. ("Suncast") and other defendants for race and disability discrimination under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. Summary judgment was entered in favor of Suncast on March 15,2000. Suncast presents its bill of costs as the prevailing party pursuant to Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920. Contreras failed to file timely objections.

"[C]osts . . . shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d). The costs that may be recovered pursuant to Rule 54(d) are specified in 28 U.S.C. § 1920. Crawford Fittine Co. v. J.T. Gibbons, Inc., 482 U.S. 437,441 (1987). They include: (1) fees of the clerk; (2) fees for transcripts; (3) fees for printing and witnesses; (4) fees for copies "of papers necessarily obtained for use in the case"; (5) docket fees; and (6) compensation of court-appointed experts and interpreters. 28 U.S.C. § 1920. Rule 54(d) creates a strong presumption favoring the award of costs to the prevailing party. Weeks v. Samsung Heavy Indus. Co., Ltd., 126 F.3d 926, 945 (7th Cir. 1997). "The presumption is difficult to overcome, and the district court's discretion is narrowly confined -- the court must award costs unless it states good reasons for denying them." Id. (citing Congregation of the Passion v. Touche, Ross & Co., 854 F.2d 219,222 (7th Cir. 1988)).

Suncast seeks $6,010.85 in costs comprised of: (1) $3,516.70 in deposition transcripts fees; (2) $1,966.55 for

copies of documents obtained for use in the case; and (3) $527.60 incurred in obtaining copies of Contreras' medical records.

1. Transcripts. Under Local Rule 54.1(b), "the costs of the transcript or deposition shall not exceed the regular copy rate as established by the Judicial Conference of the United States and in effect at the time the transcript or deposition was filed . . ." The Judicial Conference has established $3 as the rate per page for an original transcript, and $0.75 as the rate per page for the first copy. Cengr v. Fusibond Piping Systems, Inc., 135 F.3d 445, 455 (7th Cir.1998). Suncast seeks a total of $3,227 for original transcripts of five depositions of Contreras. Invoices supplied by Suncast indicate that these transcripts total 798 pages. At $3 per page, Suncast may recover $2,394 for the transcripts. The invoices also indicate a total of $828 for court reporter appearance fees for the depositions. These too may be recovered. Held v. Held, 137 F.3d 998, 1002 (7th Cir. 1998). Finally, Suncast seeks $5 for an exhibit to one of Contreras' depositions. However, this cost is not supported by the invoice. Therefore, Suncast may recover $3,222 for the Contreras depositions ($2,394 + $828).

Suncast seeks a total of $289.70 for copies of the deposition transcripts of the individual defendants (Michael Hamilton, Thomas Tisbo, Randall Guillotte, and John Baunach) and Contreras' physician, Dr. Robert Eilers. These depositions were necessary. However, Suncast fails to attach an invoice for the Guillotte transcript. Transcripts of the remaining depositions total 254 pages. At $.75 per page, Suncast may recover $190.50 for the transcripts. Suncast may also recover $2.70 for a copy of an exhibit to the Hamilton

deposition. Accordingly, Suncast may recover $193.20 ($190.50 + $2.70) for transcript copies of the Hamilton, Tisbo, Baunach and Eilers depositions. Thus, Suncast may recover $3,4 15.20 ($3,222 + $193.20) in transcript costs.

2. Copies. Suncast seeks $1,966.55 for necessary copies. For court filings, Suncast may recover the costs of one copy filed with the court, one copy served upon Contreras, and one file-stamped copy for Suncast's own use. Vogl v. Arrow Pattern & Foundry Co., 1994 WL 380598, at * 1 (N.D. Ill. July 18, 1994) (Conlon, J.). Suncast seeks $838.60 for copies of court filings based on a rate of $.20 per page, and attaches a verified schedule and copying records detailing the costs. For the most part, the court finds this amount reasonable. However, the court must deduct $7.20 sought for 3 copies of the first amended complaint. This document was filed by Contreras, not Suncast. Accordingly, Suncast may recover $83 1.40 for copies of court filings.

Suncast seeks $224.20 for additional copies of the Hamilton, Tisbo, Guillotte, Baunach, and Eilers deposition transcripts based on a rate of $.20 per page. These costs must be denied, as Suncast is entitled to only one copy of a deposition transcript under Local Rule 54.1. Suncast seeks $171.00 for copies of documents produced by itself and Contreras. These costs appear reasonable. Finally, Suncast seeks $732.65 for copies of documents subpoenaed from various entities. Suncast does not explain how these documents relate to the case; therefore, these costs may not be recovered. Thus, Suncast may recover $1,002.40 ($83 1.40 + $171.00) in copying charges.

3. Medical Records. Finally, Suncast seeks $527.60 for obtaining copies of Contreras' medical records. Costs of copying medical records are recoverable. Finchum v. Ford Motor Co., 57 F.3d 526, 534 (7th Cir. 1995). Obtaining copies of these records was necessary, since Contreras placed his medical condition in issue. See Gillman v. Crown Equipment Corp., 1996 WL 556706, at * 2 (N.D. Ill. Sept. 26, 1996) (Kocoras, J.). Suncast has attached invoices substantiating the claimed charges. Suncast may recover $527.60 for copies of Contreras' medical records.

In sum, Suncast may recover $4,945.20 in total costs ($3,415.20 for transcript costs; $1,002.40 for copying costs; $527.60 for medical records).

/s/ Suzanne B. Conlon

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Filed April 15, 2000]

No. 96 C 3439

ANTONIO CONTRERAS, *Plaintiff*,	)
v.	)
SUNCAST CORPORATION, THOMAS TISBO, JOHN BAUNACH, MICHAEL HAMILTON and RANDALL GUILLOTTE, *Defendants*.	)

MEMORANDUM OPINION AND ORDER

Antonio Contreras ("Plaintiff") brought this eight count claim against Suncast Corporation, Thomas Tisbo, John Baunach, Michael Hamilton and Randall Guillotte ("Defendants"). Both parties move the court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth below, the court grants defendants' motion for summary judgment on the federal claims and dismisses the pendent state law claims without

prejudice. The court denies plaintiff's motion for summary judgment.

Background

Antonio Contreras ("Contreras") worked as a forklift operator at defendant Suncast Corporation ("Suncast") from November 14, 1994 until February 13, 1996. (12(M) ¶ 12.)[1] Contreras suffered an on-the-job injury and filed a workers compensation claim in July 1995. (12(M) 1¶ 18-22.) As a result of his injuries, Contreras's physician restricted him to drive no more than four hours per day and to work on light duty assignments for the remainder of the day. (12(M) ¶¶ 33-34.) Defendants complied with this requirement. (12(M) ¶¶ 28-34.)

In December 1995, Contreras struck his head on a metal rack in Suncast's warehouse when he heard defendant Randall Guillotte, ("Guillotte"), plaintiff's supervisor, call out his name. (12(M) ¶ 35.) Contreras contends that Guillotte intentionally called out his name so that Contreras would injure himself. (12(M) ¶ 38.)

During the course of his employment, Contreras was repeatedly disciplined for wrongful conduct. In July 1995, Suncast issued him a verbal and written warning for violating its forklift safety rules. (12(M) ¶¶ 46-47.) In November 1995, Contreras was given a verbal warning after he called his

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[1]Unless otherwise noted, 12(M) refers to Defendants' Statement of Material Facts pursuant to Local Rule 12(M). (Local Rule 12(M) is now known as Local Rule 56.1 (a).

supervisor a "motherfucker" in Spanish. (12(M) ¶¶ 48-49.) Between January 3 and February 8, 1996, Contreras violated Suncast's attendance policies seven different times and was caught falsifying a Suncast time card to cover up one of these violations. (12(M) ¶¶ 60-64, 68-73.) Having been progressively disciplined for his multiple offenses-including a suspension-Suncast discharged Contreras on February 13, 1996 when he again violated its attendance policy. (12(M) ¶¶76-78).[2] Although Suncast offered to reinstate him without any condition that he waive any claim he might have against Suncast (12(M) ¶¶ 79-81), Contreras rejected this offer and instituted this action, (12(M) ¶ 86.)

Contreras alleges that: (1) Suncast wrongfully discriminated against him in violation of Title VII of the Civil Rights Act of 1964 on the basis of his national origin by failing to give him a light duty assignment after he was injured; (2) Suncast retaliated against him in violation of Title VII by terminating him after he filed an EEOC discrimination charge; (3) Suncast violated the Americans with Disabilities Act ("ADA") by refusing to reasonably accommodate him after he was injured on the job; (4) Suncast violated the ADA by terminating him because he requested an accommodation; (5) Guillotte assaulted Contreras; (6) Suncast and its presidents were negligent in supervising Guillotte and directed Guillotte to stalk and assault Contreras; and (7) Suncast wrongfully discharged Contreras after he filed a workers

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[2]On January 18, 1996, after being suspended from work, Contreras filed a claim with the EEOC alleging harassment and failure to accommodate.

compensation claim. Plaintiff has had more than three years of discovery.

Analysis

Both parties move the court to enter summary judgment on their behalf under Rule 56 of the Federal Rules of Civil Procedure. The court will render summary judgment only if the factual record shows "that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law ." Bratton Package Sys., Inc., 77 F.3d 168, 173 (7th Cir. 1996) (quoting Fed. R. Civ. P. 56(c);. The court will not render summary judgment if "a reasonable jury could return a verdict for the nonmoving party." Sullivan v. Cox, 78 F.3d 322, 325 (7th Cir. 1996) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). In ruling on a motion for summary judgment, the court views the facts in the light most favorable to the nonmoving party. See Bratton, 77 F.3d at 171 (citation omitted); Sullivan, 78 F. 3d at 325 (citation omitted).

On a motion for summary judgment, the moving party "bears the initial burden of showing that no genuine issue of material fact exists." Hudson Ins. Co. v. City of Chicago Heights, 48 F.3d 234, 237 (7th Cir. 1995) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Then the burden shifts to the nonmoving party, which "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); accord NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 234 (7th Cir. 1995) (citations omitted).

These burdens are reflected in Rule 12 of the Local General Rules for the Northern District of Illinois.[3] See Waldridge v. American Hoechst Corp., 24 F.3d 918, 921-22 (7th Cir. 1994). Under Rule 12(M)(3),[4] the moving party must submit a statement of material facts in the form of short numbered paragraphs supported by specific references to the factual record. Under Rule 12(N)(3),[5] the nonmoving party must submit a response to each such paragraph, including (in the case of disagreement) specific references to the factual record.[6] If the nonmoving party fails to disagree with a fact in the moving party's 12(M) statement, the court will deem that fact admitted. See Local Rule 12(N)(3). Similarly, if the nonmoving party disagrees with a fact in the moving party's statement but fails to support its disagreement with a specific reference to the factual record, the court may deem that fact admitted as well. See Fed. R. Civ. P. 56(e); Flaherty v. Gas Research Institute, 31 F.3d 451, 453 (7th Cir. 1994) (citations omitted). The Seventh Circuit Court of Appeals has "repeatedly upheld the strict enforcement of these rules."

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[3]The Local Rules have been recently renumbered. Rule 12 is now known as Rule 56.1.

[4]Now known as Rule 56.1(a).

[5]Now known as Rule 56.1(b).

[6]Rule 12(N)(3) further instructs the nonmoving party to submit a statement of any additional facts requiring denial of summary judgment, in the form of short numbered paragraphs supported by specific references to the factual record. In turn, Rule 12(M)(3) instructs the moving party to submit a concise reply to any such additional facts, including (in the case of disagreement) specific references to the record.

Waldridge, 24 F.3d at 922; also, e.g., Knoblauch v. DEF Express Corp., 86 F.3d 684, 690 (7th 1996).

I. National Origin Discrimination in Discharge

Contreras alleges in Count I of his complaint that Suncast violated Title VII by discriminating against him on the basis of his Hispanic national origin when it discharged him. Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000(e)-2(a)(1). To prove a Title VII employment discrimination claim, a plaintiff must present either direct or indirect evidence of discrimination. See Gadsby v. Norwalk Furniture Corp., 71 F.3d 1324, 1330 (7th Cir. 1995).

Under the "direct method," a plaintiff must show (either through direct or circumstantial evidence) that the employer's decision to take the adverse job action was motivated by an impermissible purpose, such as national origin. See Troupe v. May Dept. Stores, 20 F.3d 734, 736 (7th Cir.1994). "Under the 'indirect' burden shifting method, the plaintiff must raise an inference of discrimination by offering sufficient evidence to establish a prima facie case." Pafford v. Herman, 148 F.3d 658, 665 (7th Cir. 1998).

Because Contreras offers no direct evidence of discrimination, the court will apply the indirect, burden shifting approach delineated by the Supreme Court in McDonnell Douglas Corp. v. Green, 411. U.S. 792, 802

(1973). To establish a prima facie case under McDonnell Douglas, Contreras must prove that (1) he was a member of a protected class; (2) he performed his job satisfactorily; (3) he suffered an adverse employment action from his employer; and (4) the employer treated other similarly situated employees outside the protected class more favorably. See Pafford, 148 F.3d at 671. By establishing a prima facie case, the plaintiff "creates a presumption that the employer unlawfully discriminated against him." Helland v. South Bend Comm. Sch. Corp., 93 F.3d 327, 329 (7th Cir. 1996). "The burden then shifts to the employer to produce evidence which, if taken as true, would permit the conclusion that it had a legitimate, non-discriminatory reason for its challenged employment action." Id. (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993)).

Once the employer meets this burden, the plaintiff must prove that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). To survive a summary judgment motion, the plaintiff must produce evidence that, if interpreted favorably to the plaintiff, "could persuade a reasonable jury that the employer had discriminated against the plaintiff." Rand v. CF Industries, Inc., 42 F.3d 1139, 1147 (7th Cir. 1994) (quoting Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1570 (7th Cir. 1989)).

Defendants contend that Contreras cannot establish a prima facie case of national origin discrimination because (1) he was not meeting Suncast's legitimate expectations and (2) he cannot show that similarly situated non-Hispanic

employees received more favorable treatment. The court agrees.

With respect to the first argument, Contreras incurred numerous disciplinary violations in the two years that he was employed at Suncast. He was given verbal and written warnings for violations of Suncast's safety rules in accordance with Suncast's progressive discipline policy on July 20, 1995, July 21, 1995, and November 7, 1995. On November 8, 1995, plaintiff received counseling and a verbal warning after he called his supervisor a "motherfucker" in Spanish. Although Contreras could have been immediately discharged for this insubordination pursuant to Suncast's disciplinary rules, he was not.

On January 3, 1996, Contreras violated Suncast's work rules by reporting to work tardy. On January 4, 1996, he again reported to work tardy and also violated Suncast disciplinary rules by failing to call in one hour before his scheduled start time to notify the company of his intended tardiness. On January 10, he did not show up to work and failed to provide the required documentation regarding the absence. On January 12, 1996, he received a three day suspension for falsifying company records after he took an excessive lunch break and tried to hide his actions by falsifying his time card. Both acts were sufficient, pursuant to company policy, to justify termination.

Contreras had further unexcused absences on January 18, 29, and 30, 1996. On February 8, 1996, he had an unexcused absence and failed to call in one hour prior to his start time to notify the company of his intended absence. On February 12, 1996, he was late to work and failed to call in

one hour prior to his start time to advise his supervisors of his potential tardiness. That was plaintiff's eighth unexcused absence or tardiness since January 3, 1996. Pursuant to Suncast's progressive discipline policy, it discharged Contreras on February 13, 1996.

Contreras's pattern of conduct demonstrates that no reasonable fact finder could conclude that he was meeting the legitimate expectations of his employer. Although Contreras contends that such violations were "trivial," the court finds otherwise. Suncast could have fired plaintiff on a number of occasions for insubordination, falsification of records, and repeated tardiness. These violations were not trivial. On the contrary, this kind of employee behavior is not only unproductive, it negatively affects the entire workplace if left unchecked. In light of this conduct, Contreras has failed to establish a prima facie case for national origin discrimination.

Furthermore, Contreras also fails to establish his prima facie case because he cannot show that similarly situated non-Hispanic employees received more favorable treatment. To establish the fourth prong of his prima facie case, Contreras must show that similarly situated, "equally bad employees were treated more leniently." Bush v. Commonwealth Edison Co., 990 F.2d 928, 931 (7th Cir. 1993). Plaintiff contends that several employees had worse attendance records and were not fired.

First, Contreras alleges that his supervisor, defendant Guillotte, missed more work than him but was not fired.[7] However, an employee and his supervisor are not generally similarly situated. See Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1042 (7th Cir. 1993) (ruling a plaintiff manager not similarly situated to subordinate employee); Washington v. American Stores Co., No. 98 C 1439, 1999 WL 966092, at *7 (N.D. Ill. Oct. 14, 1999) (holding that a new cashier and a supervisor of twenty years experience are not similarly situated); Ulreich v. Ameritech Cellular Communications, Inc., No. 97 C 4281, 1999 WL 160838, at *6 (N.D. Ill. Mar. 16, 1999) (finding a manager and assistant manger not similarly situated), aff'd, 202 F.3d 275 (7th Cir. 2000) (table). Unlike Contreras Guillotte was a supervisor and not a bargaining unit employee. Courts are not going to second guess an employer's decision to treat supervisor absences different than employee absences. See Sarsha, 3 F.3d at 1042 (ruling that a "court does not sit to review a company's business judgments"). Moreover, Guillotte's absences were excused-his son was undergoing open-heart surgery-while Contreras's absences were not.

Next, plaintiff notes that Jorge Garcia was absent from September 18, 1997 until October 27, 1997 when he went to Mexico and was not fired. However, because Garcia is also Hispanic, he is also not a similarly situated non-Hispanic

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[7]Although Contreras claims that Guillotte missed more work in 1988 than Contreras did in November 1995 and February 1996, (PI's 12(M) ¶ 7(b)), the record does not support this claim. The record does indicate, however, that Guillotte missed a large number of days in 1990 and 1992. (Guillotte Apr. 9, 1999 Dep. at 67-69.

employee. Similarly, plaintiff wrongfully cites to two other Hispanic employees-Marco Aguilar and Steve Salazar-who he believes were treated more favorably by Suncast. While this may demonstrate that Suncast unfairly treated Contreras, it does not demonstrate federally proscribed discriminatory treatment.

Finally, Contreras contends that Suncast did not fire Tony Bucaro ("Bucaro") even though he missed work from August 7, 1995 until December 7, 1995. However, Bucaro was not at work because he had not been released by his physicians. Therefore, Bucaro's absences were excused. Consequently, the court grants defendants motion for summary judgment on this count because Contreras fails to demonstrate a prima facie case for Title VII national origin discrimination.

II. National Origin Discrimination in Job Assignments

Contreras next alleges that Suncast discriminated against him on the basis of his national origin when it failed to give him a light duty assignment after he was injured. He claims that two injured, white co-workers-Gary McCrea ("McCrea") and Bucaro-were given light duty assignments while he was not. Defendants contend that Contreras cannot meet his prima facie test because he cannot show that Suncast treated similarly situated non-Hispanic employees more favorably.

McCrea is not similarly situated because, in part, he and the Contreras reported to different supervisors. See Timms v. Frank, 953 F.2d 281, 287 (7th Cir. 1992) (ruling that where different decision makers are involved, two

employees are likely not similarly situated). Moreover, unlike plaintiff, McCrea was neither a forklift operator nor a bargaining unit employee. Rather, McCrea was a spotter and part-time customer service representative. During the time of his injury, Suncast accommodated McCrea by allowing him to work full-time in the customer service department, a position for which he was already qualified but Contreras was not.

Contreras's comparison to Tony Bucaro is equally unavailing. First, Contreras and Bucaro reported to different supervisors. See id. Second, Bucaro did not obtain an accommodation as plaintiff suggests. Specifically, Bucaro remained *out of* work for more than three months-except for four days when he attempted to perform his regular duties-because there were no light duty positions available for him. Moreover, Bucaro's injury was sustained out of work. For these reasons, Contreras cannot claim that he and Bucaro were similarly situated. Having failed to meet his prima facie burden, the court grants defendant's motion for summary judgment on this count.

III. Disability Discrimination Claim for Failure to Accommodate

To survive a motion for summary judgment on this claim, Contreras must show that: (1) he is or was disabled within the meaning of the ADA; (2) Suncast was aware of his disability; and (3) he was qualified for the position in question. See Foster v. Arthur Andersen LLP, 168 F.3d 1029, 1032 (7th Cir. 1999). To qualify for the position in question, Contreras must also show that he is physically capable of performing the essential function of the position

and that he meets the legitimate educational, training, experience and other requirements set by Suncast for the position. See Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 676 (7th Cir. 1998). Defendants contend that Contreras's claim fails because he is neither disabled nor qualified for any other available position.

The ADA, which prohibits discrimination against a "qualified individual with a disability, 42 U.S.C. § 12112(a), defines disability as a "physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(a). Contreras alleges that his physical impairment substantially limits the major life activities of work and sexual intercourse.

With respect to the major life activity of work, Contreras claims that he is unable to lift in excess of forty-five pounds for a long period of time, unable to engage in strenuous work, and unable to drive a forklift for more than four hours per day. In Kirkendall v. United Parcel Serv. Inc., a New York federal court examined a similar set of claims. 964 F. Supp. 106 (W.D.N.Y. 1997). Because of a degenerative disk disease, Kirkendall was unable to lift more than thirty pounds, was unable to sit for prolonged periods of time, was unable to play normally with his children, was unable to engage in a number of recreational activities, and was unable to engage in sexual intercourse with his wife as frequently. See id. at 109-10.

The district court noted that none of the limitations either individually or collectively had the effect of substantially limiting him in his major life activity of work. See id. at 110; see also Williams v. Channel Master Satellite

Sys., Inc., 101 F.3d 346, 349 (4th Cir. 1996) (holding that a twenty-five pound lifting limitation does not constitute a significant restrict on one's ability to lift, work, or perform any other major life activity); Snow v. Ridgeview Med. Ctr., 128 F.3d 1201, 1207 (8th Cir. 1997) (same); McKay v. Toyota Motor Mfg., 110 F.3d 369, 373 (6th Cir. 1997) (same). This court agrees. The inability to lift in excess of forty-five pounds for a long period of time is not a significant restriction on one's ability to work. Consequently, this court rejects Contreras's claim that he is substantially limited in the major life activity of work.

Plaintiff does establish that his back condition substantially limits the major life activity of reproduction. Defendants contend that the major life activity of reproduction is not a recognized disability under the ADA. The ADA does not define "major life activity." See Bragdon v. Abbott, 524 U.S. 624, 638 (1998). However, "the plain meaning of the word major denotes comparative importance and suggests that the touchstone for determining an activity's inclusion under the statutory rubric is its significance. See id. (quotations omitted). A major life activity also must be a "basic activity that the average person in the general population can perform with little or no. difficulty." See Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999).

In Bragdon, the Supreme Court strongly implied that engaging in sexual relations is a major life activity. 524 U.S. at 638 (holding that reproduction falls well within the phrase "major life activity" because "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself"). The Ninth Circuit has also ruled that engaging in sexual relations, like procreation, is a major life activity. See

McAlindin v. County of San Diego 192 F.3d 1226, 1234 (9th Cir. 1999) (reasoning that more people chose to engage in sexual relations than those who choose to have children). In light of these decisions and for purposes of this motion, the court finds that Contreras is disabled under the ADA. However, Contreras has not properly rebutted the evidence that defendants knew about his disability.

Defendants submitted an affidavit stating that Contreras's doctor never indicated that plaintiff had a sexual dysfunction. Defendants having met their initial burden, the burden shifted to Contreras to demonstrate a genuine issue of material fact regarding this issue. He states: "*Suncast* fails to meet its burden, which is to present at least some evidence to assert that Contreras is in fact *not substantially limited* in that major life activity." (Pl.'s Resp. at 10 (emphasis added).) Contreras misinterprets his burdens under the ADA, Rule 56 of the Federal Rules of Civil Procedure, and the local rules. Defendants are not required to prove a negative. Rather, *plaintiff* must show that the employer had knowledge of the employee's disability. See Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 563 (7th Cir. 1996) (stating that "[b]efore an employer may be liable for failing to provide an employer with reasonable accommodation, the employer must be aware of the employee's disability"). Having failed to establish with any evidence or create a genuine issue of material fact on this issue, Contreras has failed to establish a crucial element of his ADA claim. Consequently, the court grants defendants' summary judgment on this claim.

IV. Claim for Retaliatory Discharge under Title VII and the ADA.

In order to prevail on a claim of retaliation, a plaintiff must either offer direct evidence of retaliation, or proceed under the burden-shifting method set out in McDonnell Douglas, 411 U.S. 792, (1973). See Smart v. Ball State Univ., 89 F.3d 437, 439 (7th Cir. 1996). Under McDonnell Douglas the plaintiff must first prove, by a preponderance of the evidence, a prima facie case of retaliation. See id. The burden then shifts to the employer to provide a nonretaliatory explanation for its actions. See id. Once the employer has offered a neutral reason for its actions, the burden shifts back to the employee to demonstrate that the employer's stated reason is merely a pretext for covering up discriminatory conduct. See id.

Having no direct evidence of discrimination, Contreras must establish a prima facie case of retaliation. To do this, Contreras must show (1) that he engaged in statutorily protected activity; (2) that he suffered an adverse employment action; and (3) that there is a causal connection between the two events. See id. at 440

Contreras claims that he was terminated on February 13, 1996 in retaliation for filing his EEOC charge on January 18, 1996. In that charge, he claimed that defendants harassed him on the basis of his national origin and denied him reasonable accommodation. Defendants contend that Contreras has not established a causal connection between his termination and his filing of the EEOC charge. The court agrees.

Aside from the fact that Contreras's EEOC charge preceded numerous violations for unexcused absences, nothing in the factual record suggest a causal connection between his EEOC charge and his subsequent termination. Merely showing that one event followed the other does not itself show evidence of discrimination. See Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1179 (7th Cir. 1998) ("Timing may be an important clue to causation, but does not eliminate the need to show causation'."); accord Avitia v. Metropolitan Club, Inc., 49 F.3d 1219, 1225 (7th Cir. 1995). By failing to show any additional facts that permit a reasonable inference of a causal connection between his EEOC charge and defendants' subsequent conduct, Contreras fails to establish a prima facie case of retaliation. As a result, the court grants defendants' motion for summary judgment on this count.

V. Remaining Issues

A. Supplemental Jurisdiction over Remaining State Law Claims

Having granted summary judgment on the federal claims, Contreras's remaining claims are dismissed without prejudice. Courts in this district have declined to exercise supplemental jurisdiction over state claims when they have dismissed all the federal claims over which they had original jurisdiction. See, e.g., Sterlina v. Kazmierczak, 983 F. Supp. 1186, 1193 (N.D. Ill. 1997). "Ordinarily, if a court rules against a plaintiff on all federal claims short of trial, the pendent state law claims are dismissed without prejudice. Plaintiff may then pursue those claims in state court." Vakharia v. Swedish Covenant Hosp., 987 F. Supp.. 633, 643 (N.D. Ill. 1997).

B. Plaintiff's Motion for Summary Judgment

In Contreras's motion for summary judgment, he argues that Suncast's accommodation policy is a *per se* violation of the ADA. To have standing under Article III of the Constitution to challenge this policy, Contreras must show: (1) injury in fact; one that is concrete and particularized and actual or imminent; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Unless Contreras is a qualified individual under the ADA, he does not have an injury in fact and, therefore, would have no standing. See Stuckey v. City of Naperville, No. 97 C 7037, 1998 WL 173298, at *4 (N.D. Ill. Apr. 7, 1998); accord Hutchinson v. United Parcel Serv., Inc., 883 F. Supp. 379, 398 (N.D. Iowa 1995).

> [T]o determine whether an individual with a disability is "qualified" requires one to answer two questions. "First, we consider whether the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc. . . . If he does, then we must consider whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation."

Dalton, 141 F.3d at 676 (quoting Bombard, 92 F.3d at 563). Moreover, the ADA does not require an employer to eliminate the essential functions of a job to accommodate a

disabled employee. See Gile v. United Airlines, Inc., 95 F.3d 492, 498 (7th Cir. 1996). Both parties agree that Contreras is not capable of operating a forklift for his entire eight hour shift. Furthermore, Contreras was offered another position following his injury but refused. (12(M) ¶ 28.) Consequently, plaintiff lacks the requisite injury in fact to challenge the policy in federal court. Accordingly, the court denies plaintiff's motion for summary judgment.

C. Contreras's Motion to Strike Defendant's Filings

Contreras claims that certain of the defendants' affidavits are facially defective because they have been notarized by John Baunach, a party to this litigation. Contreras argues that a party cannot notarize any instrument and, therefore, the affidavits are unsworn and must be stricken. Although affidavits no longer need to be notarized, unsworn declarations are only allowed if made "under penalty of perjury" and verified as "true and correct." 28 U.S.C. § 1746; accord DeBruyne Equitable Life Assurance Soc'y, 920 F.2d 457, 471 (7th Cir. 1990). The Illinois Notary Public Act, 5 ILCS 312/6-104(b) provides that a "notary shall not acknowledge any instrument in which the notary's name appears as a party to the transaction." It is not clear, however, whether a motion for summary judgment is considered a "transaction." Even if a summary judgment is a "transaction," it is also not clear that the notary's acknowledgment of an affidavit in which his name appears as a party invalidates the affidavit. Because defendants have cured the claimed defect, the court declines to answer these questions.

On August 25, 1999, the court granted defendants' motion to substitute affidavits that were notarized by a nonparty. The court found that Contreras would not be prejudiced by granting this motion because the affidavits were identical to the original affidavits except for the notary public. Consequently, the court denies Contreras's motion to strike filings as moot.

Conclusion

For the reason set forth above, the court grants defendants' motion for summary judgment with respect to the federal claims [55-1]. The court dismisses the pendent state claims without prejudice. The court denies plaintiff's motion for summary judgment [68-1]. The court also denies plaintiff's motion to strike filings [79-1].

ENTER:

/s/_____
Ann Claire Williams,
Judge

Dated: March 15, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed March 15, 2000]

No. 96 C 3439

ANTONIO CONTRERAS	)
	)
v.	)
	)
SUNCAST CORPORATION, et al	)
	)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that pursuant to the court's memorandum opinion and order entered on March 15, 2000 summary judgment with respect to the federal claims and judgment by dismissal without prejudice of the pendent state claim is entered in favor of defendants' and against plaintiff; that plaintiff take nothing and this action is dismissed on the merits.

Michael W. Dobbins, Clerk of Court

Date: 3/15/2000 /s/_____
Diane Love, Deputy Clerk

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

[Filed March 15, 2000]

No. 96 C 3439

ANTONIO CONTRERAS,)
)
v.)
)
SUNCAST CORP., et al.)
)

Magistrate Judge: Suzanne B. Conlon

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.
(2) ☐ Brief in support of motion due ____.
(3) ☐ Answer brief to motion due ____. Reply to answer due ____.
(4) ☐ Ruling/Hearing on ____ set for ____ at ____.
(5) ☐ Status hearing [held/continued to] [set for/re-set for] on ____ set for ____ at ____.
(6) ☐ Pretrial conference [held/continued to] [set for/re-set for] on ____ set for ____ at ____.
(7) ☐ Trial [set for/re-set for] on ____ at ____.
(8) ☐ [Bench/Jury trial] [Hearing] held/continued to ____ at ____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]
☐FRCP4(m) ☐General Rule 21
☐FRCP41(a)(1) ☐FRCP41(a)(2)

(10) ■ [Other docket entry] Pursuant to memorandum opinion and order the court grants defendants' motion for summary judgment with respect to the federal claims [55-1]. The court dismisses the pendent state claim without prejudice. The court denies plaintiff's motion for summary judgment [68-1]. The court also denies plaintiff's motion to strike filings [79-1].

(11) ■ [For further detail see order on the reverse side of the original minute order.]

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

[Entered March 7, 2000]

Michael W. Dobbins
CLERK
Office of the Clerk

Richard R. Rothman
212 West Washington Street
Suite 1401
Chicago, IL 60606

Title: Contreras v. Suncast Corp

Assigned Judge: Honorable Suzanne B. Conlon

REASSIGNMENT ORDER of 3/3/00 Case reassigned to Hon. Suzanne B. Conlon from Hon. Ann C. Williams pursuant to 2.30G. (See reverse of minute order.) Mailed notice

This docket entry was made by the Clerk on March 7, 2000

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS,the automated docketing system used to maintain the

civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

[Docketed March 7, 2000]

No. 96 C 3439

In the matter of:	)
	)
Antonio Contreras	)
	)
vs.	)
	)
Suncast Corporation, et al	)
	)

TRANSFER OF CASE BY CLERK OF COURT TO THE EXECUTIVE COMMITTEE FOR REASSIGNMENT

It appearing that the above-captioned case requires further judicial action, I therefore recommend to the Executive Committee that this case be reassigned by lot to an active judge of this court. The reasons for my recommendation are indicated on the reverse of this form.

MICHAEL W. DOBBINS, CLERK

/s/Kathleen Branch

Transfer of Case By Clerk of Court - 3/1/00 & Order - 3/3/00

Dated: March 1, 2000 Deputy Clerk

Reverse of Transfer Order

2.30 B [ ] This cause is currently pending on the Fugitive Calendar having previously been assigned to the calendar of Judge who is no longer sitting; it is recommended that it be reassigned to the calendar of an active judge of this court, the defendant no longer being a fugitive.

2.30 F [ ] Pursuant to the provisions of General Rule 44, this cause is to be reassigned by lot having been reversed and remanded pursuant to a mandate issued by the U.S. Court of Appeals, 7th Circuit.

2.30 G [X] This cause having last been assigned to the calendar of Judge Williams who is no longer sitting; it is recommended that it be reassigned to the calendar of an active judge of this court as it appears to require further judicial action.

****

ORDER OF THE EXECUTIVE COMMITTEE

IT IS HEREBY ORDERED that the clerk of the Court reassign the above-captioned case by lot to the calendar of an active judge of this court in accordance with the Rules.

ENTER:

FOR THE EXECUTIVE COMMITTEE

/s/ Marvin Aspen
Chief Judge

Dated: 3/3/2000 [R. 91]

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

[Filed February 13, 2001]

Nos. 00-1977 & 00-2493

ANTONIO S. CONTRERAS,
Plaintiff-Appellant,

v.

SUNCAST CORPORATION, an Illinois corporation, THOMAS TISBO, JOHN BAUNACH, RANDALL GUILLOTTE, and MICHAEL HAMILTON,
Defendants-Appellees.

Before

Hon. JOEL M. FLAUM, Chief Judge

Hon. FRANK H. EASTBROOK, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

Appeal from the United States District Court for the
Northern District of Illinois.
Eastern Division.

Suzanne B. Conlon, Judge.

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed in the above-captioned case on January 26, 2001, by plaintiff-appellant, no judge in active service* has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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*The Honorable Ann Claire Williams did not participate in the consideration of this petition.

APPENDIX G

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

- Article III, ¶ 2 of the Constitution of the United States provides:

  The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. U.S. Const. Art. III.

- The Fifth Amendment to the Constitution of the United States provides:

  No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. Amend. V.

- The Fourteenth Amendment to the Constitution of the United States provides:

  Sec. 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV.

- Rule 77(d) of the Federal Rules of Civil Procedures provides, in part:

  Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note of the docket of the mailing. . . . Fed.R.Civ.P. 77(d)

Constitutional Provisions and Statutes Involved

- The Americans with Disabilities Act provides in part:

(a) Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
(b) Interference, coercion, or intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter. 42 U.S.C. § 12203.

- The Americans with Disabilities Act provides in part:

Discrimination. (a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
(b) Construction. As used in subsection (a), the term "discriminate" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such

applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation

would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant. 42 U.S.C. § 12112.

- Title VII of the Civil Rights Act of 1964 provides in part:

§ 2000e-2. Unlawful employment practices. (a) Employer practices. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race,

color, religion, sex, or national origin. 42 U.S.C. § 2000e-2.

- Title VII of the Civil Rights Act of 1964 provides in part:

§ 2000e-3. Other unlawful employment practices. (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 U.S.C. §§ 2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C. §§ 2000e-2000e-17].

- 28 U.S.C. § 1367. Supplemental jurisdiction.

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original

jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

APPENDIX H

TABLE SHOWING DISPARITY IN IMPOSITION OF DISCIPLINE FOR VIOLATIONS OF SUNCAST'S WORK RULES

[Fold-out]

Table Showing Disparity in Imposition of Discipline for Violations of Suncast's Work Rules

Employee	Employment Action	Dates/Description of Circumstances	Disciplinary Action	Record Cite
Randy Guillotte	5 absences	1/7/98-3/9/98	Oral Warning	S1752
Randy Guillotte	4.5 absences	1/24/92-3/24/92	Written Warning	S 1814
Randy Guillotte	4 absences	3/35/92-5/6/92	Written Warning	S 1814
Randy Guillotte	4 absences	4/6/89-10/24/89	Written Warning	S1832
Lorenze Enrique	N/A	Cut in Line with Time card	3-day suspension	
Art Munoz	7 tardies	1/3/96-5/1/96	written warning	S2706-07
Art Munoz	1 absence	4/13/96	written warning; promoted on 2/16/99	S2704; S2678
Jose Salgado	Failed to Report Accident	3/22/95	oral warning	S1653
Jose Salgado	3 tardies and 2 absences	4/30/95-5/17/95	written warning	S 1646
Jose Salgado	Forklift Accident	7/24/95	3 day suspension	S 1645
Jose Salgado	Broken Equipment	11/1/95	Discharge	S 1635
Lee Pegues	2 absences	11/28-29/95	Written Warning	S2401
Lee Pegues	4 Long Lunches	12/27/95, 12/28/95, 1/5/96, 1/26/96	None	S2404-S2406

Lee Pegues	4 absences	2/21-26/96	3 day suspension	S 2400
Lee Pegues	18 absences in 4 months	4/15/96	Discharge	S2399,[1] S2403
Jesse McGee	12 tardies or absences	10/24/95-11/13/95	Written Warning	S2373
Jesse McGee	13 tardies and 1 absence	1/12/96	3-day suspension	S2374
Jesse McGee	5 absences 11 tardies	5/31/96-10/31/96	Oral Warning	S2372
Jesse McGee	2 absences	3/21/97, 3/24/97	Voluntary Quit	S2365
Marco Aguilar	4 absences	2/97	oral warning	S1848
Marco Aguilar	3 absences	4/97	written warning	S1847
Marco Aguilar	3 absences	6/20/97	3-day supension	S1846
Marco Aguilar	safety violation	7/15/97	3-day suspension	S1845[2]
Marco Aguilar	3 tardies	1/13/98	written warning	S1844

[1]Pegues' employment record suggests that he had car trouble in St. Louis at the end of January , but had not documentation, and "no disciplinary action taken." [S2404]

[2]Aguilar's employment file comments that he was suspended for this violation because he "otherwise [has] a good record."

(2)

Supreme Court, U.S.
FILED

JUL 16 2001

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No. 00-1877

IN THE

Supreme Court of the United States

ANTONIO S. CONTRERAS,

Petitioner,

v.

SUNCAST CORPORATION, an Illinois Corporation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Suncast Corporation, is an Illinois corporation and has no parent or subsidiary corporation. No publicly held company owns 10% or more of the stock of Suncast.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iv

Statement of the Case 1

A. Statement of Facts 1

B. The District Court Decision 3

C. The Seventh Circuit Decision 6

Reasons for Denying the Writ 9

A. Contreras Incorrectly Asserts That All of His Federal Claims Were Decided On Article III Standing Grounds 9

B. The Seventh Circuit Properly Held that Contreras Did Not Have Standing to Challenge Suncast's Accommodations Policy As *Per Se* Violative of the ADA 10

C. The Seventh Circuit Did Not Deprive Contreras His Due Process Rights by Finding as a Matter of Law That He Was Not Meeting the Legitimate Expectations of His Employer 13

Contents

	Page
D. Judge Williams' Judgment Was Not Void ..	14
E. Contreras' New Chart Allegedly Showing Disparity in Discipline for Work Rule Violations Should Be Rejected	15
Conclusion	17
Appendix — AO Form 25d (Rev. 6/83) Designation Of Circuit Judge For Service In A District Court Within His Circuit Dated November 17, 1999	1a

TABLE OF CITED AUTHORITIES

Page

Cases:

California v. Taylor, 353 U.S. 553 (1957) 15, 16

Griffin v. Steeltek, 160 F.3d 591 (10th Cir. 1998) .. 12, 13

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 11

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 14

Roe v. Cheyenne Mountain Conference Resort, 124 F.3d 1221 (10th Cir. 1997) 12, 13

Statutes:

28 U.S.C. § 1332 5

42 U.S.C.§ 12112(d)(2) 12

42 U.S.C. § 12112(d)(4)(A) 13

42 U.S.C. § 12203 10

STATEMENT OF THE CASE

This is a routine Title VII and Americans With Disabilities Act ("ADA") case wherein the plaintiff failed to present any evidence supporting his discrimination claims and accordingly the district court granted defendant summary judgment and the Seventh Circuit affirmed. Unhappy with the results, plaintiff seeks to petition this Court for Certiorari, raising new arguments not asserted below and misstating the rulings of both the district court and the Seventh Circuit.

A. Statement of Facts

Plaintiff, Antonio Contreras ("Contreras"), a Mexican-American, worked for defendant, Suncast Corporation ("Suncast"), as a forklift operator from November of 1994 until he was terminated for repeated violations of Suncast's work rules on February 13, 1996. The day following his termination, at the behest of Contreras' union, Suncast offered to reinstate Contreras. Contreras, however, advised Suncast that he was not interested in returning to work, but wished to pursue legal action instead. (Pet. App. 2a-4a).

Suncast is a manufacturer and distributor of lawn and garden equipment. During Contreras' employment with Suncast, Thomas Tisbo was Suncast's president, Michael Hamilton was the vice-president, John Baunach was the manager of human resources, and Randall Guillotte was a production flow supervisor responsible for supervising Contreras. (Pet. App. 2a).

On June 21, 1995, Contreras injured his back in a forklift accident at work and as a result of his injuries, was instructed by his physician not to drive a forklift for more than four

hours a day and to spend the remainder of the day on light duty work. Suncast complied with these restrictions though Contreras argues that Suncast's accommodations were inadequate. (Pet. App. 3a, 33a). On December 18, 1995, Contreras injured his head on a metal rack after hearing Guillotte call out his name. (Pet. App. 3a, 33a).

During Contreras' short employment with Suncast, Contreras amassed a horrendous disciplinary record and received numerous warnings regarding his repeated violations of Suncast's work rules. Contreras' disciplinary problems began on July 20, 1995, when he was given a verbal warning for violating the forklift safety rules. The next day, Contreras was given a written warning for failing to follow safety procedures. (Pet. App. 3a, 33a).

On November 7, 1995, Guillotte observed Contreras and two co-workers violating forklift safety rules. Guillotte met with the three as a group and gave each of them a copy of the forklift safety rules. As Guillotte walked away from the meeting, Guillotte heard Contreras say "Chingado," from which he understood Contreras was calling him a "motherfucker." Guillotte gave Contreras a warning for insubordination. Contreras maintains that he actually said "vamanos a la chingada," which Contreras says means "let's get the hell out of here." (Pet. App. 3a, 34a).

In addition, Contreras was disciplined repeatedly for violating Suncast's attendance policies. Between January 3, 1996 and February 8, 1996, Contreras violated Suncast's attendance policies on seven different occasions. In fact, Contreras was caught falsifying a Suncast time card in an attempt to cover up one of these violations and was suspended. (Pet. App. 3a, 34a).

On February 12, 1996, Contreras violated Suncast's attendance policy for the eighth time in a little over one month by reporting to work tardy and for failing to call in one hour prior to his start time to advise Suncast that he would be late. Suncast discharged Contreras on February 13, 1996 due to his repeated violations of Suncast's work rules in accordance with Suncast's progressive discipline policy. Although Suncast offered to unconditionally reinstate Contreras the next day, Contreras rejected this offer and instituted the instant lawsuit. (Pet. App. 4a, 34a, 39a-40a).

B. The District Court Decision

Contreras sued alleging that: (1) Suncast terminated him based on his national origin and also failed to give him light duty work in violation of Title VII of the Civil Rights Act of 1964; (2) Suncast retaliated against him in violation of Title VII by discharging him after he filed an EEOC charge; (3) Suncast failed to reasonably accommodate him following his injury and discriminated against him for requesting accommodations in violation of the Americans With Disabilities Act; (4) Guillotte had assaulted him by intentionally causing him to bang his head on the metal rack on December 18, 1995; (5) Suncast was negligent in supervising Guillotte and directed Guillotte to stalk and assault Contreras; and (6) Suncast wrongfully discharged him because he filed a workers compensation claim. (Pet. App. 4a, 34a).

On March 15, 2002, the Honorable Ann C. Williams of the United States District Court for the Northern District of Illinois, granted summary judgment in favor of Suncast on all federal claims and dismissed the state law claims without prejudice. (Pet. App. 4a). With respect to Contreras' national origin discharge claim, the district court concluded that

Contreras could not establish a *prima facie* case of national origin discrimination because he was not meeting Suncast's legitimate expectations and because Contreras could not show that similarly situated non-Hispanic employees received more favorable treatment. (Pet. App. 38a-42a). The district court noted:

> Contreras' pattern of conduct demonstrates that no reasonable fact finder could conclude that he was meeting the legitimate expectations of his employer. Although Contreras contends that such violations were "trivial," the court finds otherwise. Suncast could have fired plaintiff on a number of occasions for insubordination, falsification of records, and repeated tardiness. These violations were not trivial. On the contrary, this kind of employee behavior is not only unproductive, it negatively affects the entire workplace if left unchecked. In light of this conduct, Contreras has failed to establish a prima facie case for national origin discrimination. (Pet. App. 40a).

With respect to Contreras' national origin in job assignments claim, the district court found that Contreras could not meet his *prima facie* case because he failed to show that Suncast treated any similarly situated non-Hispanic employee more favorably. (Pet. App. 42a-43a).

The district court granted Suncast summary judgment on Contreras' failure to accommodate claim under the ADA, finding that Contreras was not a qualified person with a disability. First, the district court found that Contreras failed to establish that he was substantially limited in the major life activity of working by virtue of his inability to lift in

excess of forty-five pounds for long periods of time, his inability to engage in strenuous work and his inability to drive a forklift for more than four hours per day. (Pet. App. 44a). In addition, the district court found that although Contreras may have initially shown that he was substantially limited in the major life activity of sexual relations, he failed to establish that Suncast had knowledge of this alleged disability. (Pet. App. 46a). In any event, the district court found that Contreras was not qualified to perform the essential functions of his job, with or without accommodation, because he admits he was not capable of operating a forklift for his entire eight hour shift. (Pet. App. 50a).

The district court further granted summary judgment in favor of Suncast on Contreras' Title VII and ADA retaliatory discharge claim finding that Contreras failed to establish a causal connection between his termination and his filing of an EEOC charge. (Pet. App. 48a). Having dismissed all of Contreras' federal claims, the district court declined to exercise supplemental jurisdiction over the state claims, and accordingly dismissed the state claims without prejudice.[1] (Pet. App. 48a).

The district court also denied Contreras' cross-motion for summary judgment wherein Contreras argued that Suncast's accommodation policy [2] is a *per se* violation of

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1. Contreras subsequently refiled the state law claims in federal court, asserting diversity jurisdiction pursuant to 28 U.S.C. § 1332. (Pet. App. 4a).

2. Contreras misstates Suncast's accommodation policy by asserting that Suncast only accommodated employees with short-term, work-related injuries. (Pet. 7). This is not Suncast's policy and Contreras' assertion to the contrary distorts the record.

the ADA. The district court held that Contreras lacked standing to challenge Suncast's accommodations policy because he was not a qualified person with a disability under the ADA. As such, Contreras did not have an injury-in-fact.[3]

The case was reassigned to district court Judge Suzanne B. Conlon following Judge Williams' appointment to the United States Court of Appeals for the Seventh Circuit. (Pet. App. 56a). On May 22, 2000, Judge Conlon partially granted Suncast's bill of costs. (Pet. App. 26a-31a).

C. The Seventh Circuit Decision

On January 3, 2001, The Seventh Circuit affirmed Judge Williams grant of summary judgment in all respects and upheld Judge Conlon's award of costs. With respect to Contreras' Title VII discriminatory discharge and discriminatory job assignment claims, the Seventh Circuit easily concluded that Contreras was not meeting Suncast's legitimate expectations and therefore failed to make a *prima facie* case:

> Though we recognize that coming to work, not falsifying documents, and not being insubordinate, are usually implicit expectations that an employer has for his or her employees, by putting these requirements in Suncast's Work

3. The district court further rejected Contreras' claim that certain of the affidavits submitted by defendants were facially defective because they were notarized by Baunach, a party to the litigation. The court noted that defendants had cured the allegedly defective affidavits by filing a motion to substitute the affidavits with identical affidavits properly notarized by a disinterested party. (Pet. Aff. 50a-51a).

> Rules, there can be no claim that these were not legitimate expectations of the company . . . The uncontroverted evidence is that Contreras did not meet those bona fide expectations. Contreras was repeatedly cited for operating his forklift in an unsafe manner. Furthermore, within less than six weeks, Contreras violated the company's work attendance guidelines on no less than eight occasions. On one such occasion, Contreras doctored the company records in an attempt to conceal his infraction. Finally, the "chingado incident," as Contreras refers to it, shows a level of insubordination that in itself was worthy of dismissal. (Pet. App. 8a-10a).

The Seventh Circuit also rejected Contreras' ADA claims, finding that he was not substantially limited in the major life activity of working, noting that Contreras has not presented any evidence "that even hints at the notion that he is precluded from a broad class of jobs." (Pet. App. 13 a). While the Seventh Circuit acknowledged that reproduction is and engaging in sexual relations may be a major life activity for purposes of the ADA, the Seventh Circuit concluded that Contreras "has not produced even a scintilla of evidence that he is significantly restricted as to the condition, manner or duration under which he can reproduce as compared to the average person in the general population." (Pet. App. 17a). Further, Contreras failed to substantiate his claim of sexual difficulties with any documentation or testimony beyond a general assertion that the frequency with which he has relations has decreased. (Pet. App. 17a).

The Seventh Circuit further agreed with the district court's analysis of Contreras' Title VII and ADA retaliation

claims, finding that the mere temporal proximity of Contreras' EEOC charge with the termination was insufficient to survive summary judgment. The appellate court concluded that Contreras was terminated after a series of unexcused absences and acts of insubordination and that there was no evidence to support that Contreras' filing of his EEOC charge had anything to do with the decision to discharge him. (Pet. App. 19a).

The Seventh Circuit also agreed with the district court that Contreras lacked standing to challenge Suncast's accommodations policy as a *per se* violation of the ADA because he was not a "qualified" person with a disability, in that he was not able to perform the essential functions of the job with reasonable accommodations. Because he was not a qualified person with a disability, the Seventh Circuit concluded that he was not the type of individual protected by the relevant portions of the ADA. (Pet. App. 20a).

On appeal, Contreras raised three additional arguments which the Seventh Circuit found "unconvincing" and disposed of "without much deliberation." (Pet. App. 21a). First, the Seventh Circuit found no error in the district court's decision to permit defendants to substitute the affidavits notarized by Baunach with affidavits notarized by a disinterested party. (Pet. App. 21a). Second, the Seventh Circuit upheld the district court's decision to relinquish pendent jurisdiction over the state law claims was within the proper discretion of the district court and was the "norm, not the exception." Finally, the Seventh Circuit rejected Contreras' contention that Judge Conlon did not have authority to award costs after the case was reassigned to her following Judge Williams' elevation to the Seventh Circuit. (Pet. App. 22a).

On February 13, 2001, the Seventh Circuit denied Contreras' Petition for Rehearing and Petition for Rehearing *En Banc*.

REASONS FOR DENYING THE WRIT

A. Contreras Incorrectly Asserts That All of His Federal Claims Were Decided On Article III Standing Grounds

Contreras incorrectly argues that "all" of his federal claims were dismissed on the grounds that he did not have Article III standing. (Pet. 8). While Contreras asserts this argument for the first time before this Court, Contreras' argument completely misstates the basis of the lower court decisions.

Neither the district court nor the Seventh Circuit ruled that Contreras did not have standing to assert his Title VII or ADA discrimination claims. To the contrary, the lower courts did not even question whether Contreras had standing to raise these claims, but proceeded to reject his claims because he failed to come forward with any evidence to prove them. With respect to the Title VII claim, the lower courts found that Contreras could not sustain a *prima facie* case because he could not establish that he was meeting his employer's legitimate expectations. (Pet. App. 10a, 40a). With respect to his ADA claims, the lower courts found that Contreras was not a qualified person with a disability, and even if he was, Suncast had no knowledge of his alleged disability. (Pet. App. 20a, 46a). Finally, with respect to his Title VII and ADA retaliation claims, the lower courts found that Contreras failed to come forward with any evidence linking the filing of his EEOC charge with any adverse employment action. (Pet. App. 18a, 47a).

Contreras improperly suggests that the Supreme Court should "resolve the issue of whether an employee who is not disabled can assert an ADA retaliation claim." (Pet. 17). This issue, however, is not at issue in this case.[4] Rather, Contreras asserted that he was disabled and that he was retaliated against because he requested ADA accommodations and filed an EEOC charge. Contrary to Contreras' suggestion, the Seventh Circuit did not decide Contreras' ADA retaliation claim on the grounds that he was not disabled and therefore lacked standing, but rather, concluded that Contreras had failed to come forward with any evidence showing a causal connection between his request for ADA accommodations or his EEOC charge and his termination.

B. The Seventh Circuit Properly Held that Contreras Did Not Have Standing to Challenge Suncast's Accommodations Policy As *Per Se* Violative of the ADA

The only claim where standing played any part in the lower courts' decision was with respect to Contreras' cross-motion for summary judgment where he argued that Suncast's accommodation policy was a *per se* violation of the ADA. It was with respect to this claim that the lower courts properly concluded that Contreras did not have standing because he was not a qualified person with a disability. (Pet. App. 19a, 49a).

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4. While this issue is not raised in this case, there appears to be no reason that this Court need address whether a non-disabled individual can assert a claim for ADA retaliation. The language of 42 U.S.C. § 12203 makes clear that the prohibition against retaliation applies to "any individual."

Contreras incorrectly suggests that there is a split in the circuits as to whether a non-disabled employee has standing to challenge an employer's accommodations policy as being a *per se* violation of the ADA. No such split exists.

Under well-settled law, in order to have standing under Article III to challenge Suncast's policy, Contreras must show: (1) injury in fact; one that is concrete and particularized and actual or imminent (not conjectural or hypothetical); (2) a causal relationship between the injury and the challenged conduct (i.e. the injury has to be fairly traceable to the challenged action); and (3) a likelihood that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The Seventh Circuit held in the decision below that because Contreras was not a qualified person with a disability, he lacked standing to assert the accommodations policy of Suncast as being a *per se* violation of the ADA. (Pet. App. 20a). According to the Seventh Circuit:

> We agree with the district court's interpretation that Contreras does not have standing to challenge Suncast's accommodations policy, in that he is not a qualified person with a disability, the type of individual protected by the *relevant portions* of the ADA . . . Contreras' impairment did not bring him within the gamut of those who could challenge the legality of Suncast's accommodations policy, and the fact that he is no longer employed by the company means that there is no risk that he will ever suffer an injury as a result of this policy. (Emphasis added).

(Pet. App. 20a).

None of the cases cited by Contreras reveal any conflict with the instant Seventh Circuit's decision or any conflict within the Circuits. Indeed, none of the cases cited by Contreras involve whether a non-disabled individual had standing to assert a per se violation of an employer's *accommodations* policy. Contreras relies heavily upon the Tenth Circuit's decisions of *Griffin v. Steeltek*, 160 F.3d 591 (10th Cir. 1998) and *Roe v. Cheyenne Mountain Conference Resort*, 124 F.3d 1221 (10th Cir. 1997). These decisions, however, actually support the decision of the Seventh Circuit in this case.

In *Griffin*, a nondisabled job applicant brought an action alleging that the employer violated the provisions of the ADA prohibiting employers from making disability-related inquiries of employees, unless the inquiry is job-related or consistent with business necessity. 42 U.S.C.§ 12112(d)(2). The Tenth Circuit held that the job applicant did not lack standing merely because he was not disabled under the ADA. In so holding, the Tenth Circuit explicitly noted that the provision at issue applies to "all employees," and is "unlike suits based on a failure to provide a reasonable accommodation" which is limited to qualified individuals with a disability. 160 F.3d. at 594. Unlike the plaintiff in *Griffin*, Contreras in this case is challenging the accommodations policy of Suncast as a *per se* violation of the ADA, which as the Tenth Circuit properly notes, is intended only to protect qualified persons with disabilities.

In *Roe*, an employee sued her employer alleging that her employer's policy of requiring employees to report their use of prescription drugs and to submit to random drug tests violated the provisions of the ADA prohibiting an employer from requiring a medical examination or inquiring about an

employee's disability unless such examination or inquiry is job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A). Similar to the court in *Griffin*, the Tenth Circuit in *Roe* found that this provision "applies to all employees" and is therefore dissimilar from a policy related to providing reasonable accommodations. 124 F.3d 1229. The Tenth Circuit held:

> This provision [42 U.S.C. § 12112(d)(4)(A)] applies to all employees. Unlike suits based on a failure to provide a reasonable accommodation, this provision is not limited to qualified individuals with disabilities.

124 F.3d at 1229. Thus, the decisions of *Griffin* and *Roe* are clearly distinguishable from Contreras' challenge to Suncast's accommodations policy in this case. The holdings of both *Griffin* and *Roe* are entirely consistent with the Seventh Circuit in this case. Because there is no conflict in the Circuits, consideration of this case by this Court is not necessary.

C. The Seventh Circuit Did Not Deprive Contreras His Due Process Rights by Finding as a Matter of Law That He Was Not Meeting the Legitimate Expectations of His Employer

Contreras argues that the Seventh Circuit, by affirming Judge Williams' finding that Contreras failed to make a *prima facie* claim for national origin discrimination because he was not meeting Suncast's legitimate expectations, deprived Contreras of his due process because such a finding "stripped Contreras of his wrongful discharge claim." (Pet. 12). In essence, Contreras is arguing that any decision by an

appellate court that has preclusive effect on another claim violates that party's due process rights. Such an argument is ridiculous.

Contreras appealed Judge Williams' grant of summary judgment to the Seventh Circuit. In analyzing Contreras' national origin claim, the Seventh Circuit necessarily had to analyze whether Contreras was able to make out a *prima facie* case of national origin discrimination. In so doing, the Seventh Circuit had to address whether Contreras was meeting Suncast's legitimate expectations under the well-settled burden shifting method outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The Seventh Circuit fully and fairly considered the arguments of the parties as well as the decision of the district court on the issue of whether Contreras was meeting Suncast's legitimate expectations. The Seventh Circuit, however, disagreed with Contreras' position and held that he was not meeting Suncast's expectations. The mere fact that the Seventh Circuit's decision might have an adverse preclusive effect on Contreras' wrongful discharge claim, in no way suggests that Contreras was denied due process. Indeed, Contreras cites no legal authority for his novel argument.

D. Judge Williams' Judgment Was Not Void

Contreras argues for the first time in his Petition for Certiorari that Judge Williams' entry of summary judgment in favor of Suncast was void because she did not have authority to enter her summary judgment order since the case had been reassigned to Judge Conlon. (Pet. 12). In the Seventh Circuit, Contreras did not challenge Judge Williams'

authority to enter summary judgment, but rather argued that it was Judge Conlon who entered a void order in granting costs in favor of Suncast. (Pet. App. 22a).

As an initial matter, this Court need not consider Contreras' newly-crafted argument raised for the first time in this Court. *See, e.g., California v. Taylor*, 353 U.S. 553, 557, n.2 (1957). Nevertheless, Contreras' argument is wrong. On November 17, 1999, the Honorable Richard A. Posner, Chief Judge of the United States Court of Appeals for the Seventh Circuit, designated and assigned Judge Williams "to hold a district court in the Northern District of Illinois in the [Seventh] Circuit, during the period beginning November 17, 1999, and ending December 31, 2000, and for such additional time thereafter as may be required to complete unfinished business." (Res. App. at 1a). This designation clearly and unequivocally granted Judge Williams authority to enter summary judgment in favor of Suncast on March 15, 2000.

Thus, Judge William had authority to enter summary judgment in this case and the parties were fully aware prior to her ruling that she planned on ruling on the pending motions. Judge Williams was an impartial Article III judge and accordingly Contreras has no basis to challenge her entry of summary judgment. (See Pet. App. 22a).

E. Contreras' New Chart Allegedly Showing Disparity in Discipline for Work Rule Violations Should Be Rejected

Contreras presents for the first time to this Court a newly-created chart attempting to reveal that Contreras was treated more harshly than other employees. (Pet. App. 70a-72a). With the exception of Randy Guillotte, Contreras failed to

assert in the lower courts that these individuals were similarly situated comparable employees who were treated better than he. (Pet. App. 40a-43a.) This new evidence and these new comparables which Contreras raises for the first time in this Court should be rejected by this Court. *See, e.g., California v. Taylor*, 353 U.S. 553, 557, n.2 (1957).

Even if this Court were to consider this chart, the chart in no way suggests that Contreras was discriminated against based on his national origin. First, of the seven individuals identified on the chart, four are Mexican-American[5]. To the extent that these individuals were treated more favorably than Contreras tends to disprove Contreras' assertion that he was discriminated against based on his national origin. Second, there is no indication by the chart as to whether these individuals are in fact similarly situated. Indeed, Randy Guillotte is not similarly situated as he was Contreras' supervisor and not a member of the bargaining unit. (Pet. App. 41a). Moreover, none of the individuals listed in the chart had as poor of an overall attendance and disciplinary record as Contreras. Thus, the chart proves nothing.

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5. Lorenze Enrique, Art Munoz, Jose Salgado and Marco Aguilar are Mexican-American.

CONCLUSION

No important issue or conflict among the circuits is presented by this case which makes resolution by this Court appropriate. Rather, this case involves a routine application of well-settled principles of employment discrimination law and nothing more. For all of these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — AO FORM 25D (REV. 6/83) DESIGNATION OF CIRCUIT JUDGE FOR SERVICE IN A DISTRICT COURT WITHIN HIS CIRCUIT DATED NOVEMBER 17, 1999

DESIGNATION OF CIRCUIT JUDGE FOR SERVICE IN A DISTRICT COURT WITHIN HIS CIRCUIT

WHEREAS, in my judgment the public interest so requires; Now, therefore, pursuant to the authority vested in me by Title 28, United States Code, Section 291(b), I do hereby designate and assign the Honorable Ann C. Williams United States Circuit Judge for the Seventh Circuit to hold a district court in the Northern District of Illinois in the said circuit, during the period beginning November 17, 1999, and ending December 31, 2000, and for such additional time thereafter as may be required to complete unfinished business.

s/ Richard A. Posner
Richard A. Posner, Chief Judge

Dated November 17, 1999 Seventh Circuit